CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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Concerning Customs and Related Matters of the

Bureau of Customs and Border Protection

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

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This issue contains:

DEPARTMENT OF HOMELAND SECURITY
BUREAU OF CUSTOMS AND BORDER PROTECTION

NOTICE

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Bureau of Customs and Border Protection

General Notices

DEPARTMENT OF HOMELAND SECURITY,
OFFICE OF THE COMMISSIONER OF CUSTOMS.
Washington, DC, December 28, 2005,

The following documents of the Bureau of Customs and Border Protection ("CBP"), Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and CBP field offices to merit publication in the CUSTOMS BULLETIN.

Jeremy Baskin for MICHAEL T. SCHMITZ,
Assistant Commissioner,
Office of Regulations and Rulings.

19 CFR PART 177

PROPOSED MODIFICATION OF RULING LETTER RELATING TO VALUATION OF MANAGEMENT FEES AND EXPENSES

AGENCY: U. S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of proposed modification of ruling letter and treatment relating to the valuation of payments made by the buyer of imported merchandise to a related company for management services provided to the buyer.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection ("CBP") intends to modify one ruling letter and any treatment previously accorded by CBP to substantially identical transactions, concerning the inclusion of management fees paid by the buyer of imported mer-

chandise to a related company. CBP invites comments on the correctness of the proposed action.

DATE: Comments must be received on or before February 10, 2006.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Regulations & Rulings, Attention: Trade and Commercial Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Submitted comments may be inspected at U.S. Customs and Border Protection, 799 9th Street, N.W., Washington, D.C. 20220, during regular business hours. Arrangements to inspect submitted comments should be made in advance by calling Mr. Joseph Clark at (202) 572–8768.

FOR FURTHER INFORMATION CONTACT: Gina Grier, Commercial and Trade Facilitation Division (202) 572–8719.

SUPPLEMENTARY INFORMATION:

Background

On December 8, 1993, Title VI (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts that emerge from the law are **informed compliance** and **shared responsibility**. These concepts are based on the premise that in order to maximize voluntary compliance with CBP laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on CBP to provide the public with improved information concerning the trade community's rights and responsibilities under the CBP and related laws. In addition, both the trade and CBP share responsibility in carrying out import requirements. For example, under section 484, Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and declare value on imported merchandise, and to provide other necessary information to enable CBP to properly assess duties, collect accurate statistics and determine whether any other legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that CBP intends to modify one ruling relating in pertinent part to the valuation of payments made by the buyer of imported merchandise for certain management services provided by a related company. Although in this notice CBP is specifically referring to one ruling, Headquarters Ruling Letter ("HQ") 548316, dated July 16, 2003 (Attachment A), this notice covers any rulings on this issue

that may exist but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been identified. Any party who has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision, or protest review decision) on the issues subject to this notice should advise CBP during this notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this notice period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice, may raise issues of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In HQ 548316, CBP addressed five issues concerning the determination of transaction value, including the dutiability of certain management fees paid by the buyer to a related company that was not the seller of the imported merchandise. The management fees were to be paid for specific services relating to the importer's sales. CBP held that the payments were not assists and, as such, were not additions to the price actually paid or payable. Although that holding was technically correct, it did not address the more germane issue of whether the payments are included in transaction value as part of the price actually paid or payable for the imported merchandise. HQ 548316 needs to be modified to incorporate a price actually paid or payable analysis of the management fees. Under such an analysis, the modified ruling will reflect that the management fees were not properly included in the price actually paid or payable for the imported merchandise, because they were not paid to, or for the benefit of, the seller and did not relate to the imported merchandise.

In modifying HQ 548316, CBP will also remove any reference to two rulings that are cited in the paragraphs relating to the management fees in the "Law and Analysis" section of HQ 548316. The rulings in question are HQ 543512, dated April 9, 1985, and HQ 542122, dated September 4, 1980 (TAA No. 4). In deference to the court decisions of Generra Sportswear Company v. United States, 905 F.2d 377 (Fed. Cir. 1990) and Chrysler Corporation v. United States, 17 CIT 1049 (1993), CBP no longer accords any weight to HQ 543512, which involved the payment of management fees by the buyer to the seller of imported merchandise. The court cases would demand a different analysis and, possibly, a different result. HQ 542122 examined whether costs for certain management, accounting and legal services constituted dutiable assists under the valuation law. Although it cor-

rectly concluded that the costs were not assists, HQ 542122, too, was issued prior to Generra and did not address the question of whether the payments were included in the price actually paid or payable. Consequently it has limited precedential value here.

As noted above, it is now CBP's position that the payments should not have been included in transaction value as part of the price actually paid or payable, because the payments were not made to the seller and there was no evidence that they benefited the seller in any way. In addition, there was no evidence that the payments were made for the imported merchandise. Pursuant to 19 U.S.C. 1625(c)(1)), CBP intends to modify HQ 548316 and any other ruling not specifically identified as set forth in HQ 548547, which is attached as "Attachment B" to this document. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment it previously accorded to substantially identical transactions. Before taking this action, we will give consideration to any written comments timely received.

DATED: December 22, 2005

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

Attachments

[ATTACHMENT A]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 548316
July 16, 2003
VAL:RR:IT:VA 548316 jsj
CATEGORY: Valuation

MR. JOHN A. BESSICH
FOLLICK & BESSICH
33 Walt Whitman Road Suite 204
Huntington Station, New York 11746

Re: Assists; Apportionment of Assist; Interest; Finance Service Fees; Management Service Fees; Royalties; Licensing Fees.

DEAR MR. BESSICH:

The purpose of this correspondence is to respond to your request dated April 16, 2003. The correspondence in issue requested, on the behalf of [ABC], a binding valuation ruling concerning the importation of women"TMs garments.

This ruling is being issued subsequent to a review of the following: (1) The submission dated April 16, 2003; (2) A proposed "Design Agreement" be-

tween [ABC] and [XYZ]; (3) An unexecuted "Financing Agreement" between [ABC] and [XYZ]; (4) An unexecuted "Administrative Services Agreement" between [ABC] and [XYZ]; and (4) A proposed "Licensing Agreement" between [ABC] and [XYZ].

Counsel, on the behalf of [ABC], requested confidential treatment for information stated to be commercial or financial information the disclosure of which would prejudice the competitive positions of [ABC] and/or [XYZ]. Customs and Border Protection will, therefore, extend confidential treatment in accordance with the request of counsel for [ABC] dated April 16, 2003. Information determined to be confidential was bracketed in the confidential version and has been redacted and substituted in the public version.

FACTS

The relevant entities involved in the proposed transaction are [ABC], a corporation organized under the laws of the State of New York, and [XYZ], a corporation organized under the laws of Spain. Counsel for [ABC] advises the Bureau of Customs and Border Protection (CBP) that [ABC] and [XYZ] are "related parties" as defined in 19 U.S.C. 1401a (g).

It is [ABC]'s intention to market and sell [XXXXX] trademarked women's garments at wholesale in the United States. The garments [ABC] intends to import will be designed by [XYZ], the owner of the [XXXXX] trademark. Although [XYZ] owns the trademark, the garments will be manufactured outside of the United States by manufacturers that are unrelated, as defined in section 1401a (g), to either [ABC] or [XYZ].

[ABC], in the proposed transaction, will order and purchase the garments directly from the foreign manufacturers. The terms between [ABC] and the manufacturers will be "FOB, port of export." [ABC], according to counsel, "will not be required to pay, either directly or indirectly, any royalties, license fees, the proceeds of resale, commissions, or any other costs or charges" as a condition of the sale of the merchandise." [XYZ] will design the garments that [ABC] will have manufactured and will, ultimately, import and sell in the United States.

Counsel for [ABC] advises Customs and Border Protection that [ABC] and [XYZ] will or have already entered into four agreements. The agreements include a design agreement, a financing agreement, an administrative services agreement and a licensing agreement.

The Design Agreement

[ABC] and [XYZ] propose entering into a "Design Agreement," a copy of which was provided to CBP. [XYZ], pursuant to the design agreement, will provide [ABC] with design services for the garments that will bear the [XXXXX] trademark. [ABC], CBP is advised, does not have a design staff.

[XYZ] will design, in Spain, the garments that [ABC] will have manufactured outside of the United States and will subsequently import and sell in the United States. [ABC], according to the agreement, will pay [XYZ] directly for all design work. The foreign manufacturers of the garments [ABC] will sell in the United States will not incur any cost for design work and the sales prices of the merchandise from the manufacturers to [ABC] will not include any costs for garment design.

Paragraph 8 of the Design Agreement sets forth the "Design Fee" to be paid by [ABC] to [XYZ]. The design fee is a "per garment design charge" and is determined based on a "three calendar year average" of:

(a) any and all actual out of pocket costs and expenses incurred by [XYZ] directly on account of the design process for each Seasonal Line including but not limited to such costs and expenses incurred in the purchase of sample garments, payments to independent art studios for designs or design services, the aggregate consultation fees paid by [XYZ] to independent contractor designers, the aggregate salaries of [XYZ] dedicated design staff; (b) divided by the total number of garments manufactured by [XYZ], [ABC] and/or any other entity including distributors and licensees using the Designs created for each Seasonal Line during each such calendar year, which amount shall be calculated and adjusted annually throughout the Term.

Counsel for [ABC] advises that the importer will add the "per garment design charge" to the price actually paid or payable at the time of each entry.

The Financing Agreement

[ABC] and [XYZ] propose entering into a "Financing Agreement" through which [XYZ] will "fund the operations of [ABC"™s] business in the United States." The agreement, in paragraph 5, obligates [ABC] to pay "[i]nterest on the loans at the prime rate of interest established by Chase Bank, N.A"¦.as computed on the daily debt balances"¦." The agreement further obligates [ABC] to pay a "service charge for each month"™s activities, which shall be $75 or 1 percent of the aggregate face amount of accounts receivable in which [XYZ] obtains a security interest"¦whichever is greater."

[XYZ] is to receive a "continuing security interest" in collateral specifically identified in paragraph 8 of the financing agreement. The foreign manufacturers are not parties to the financing agreement and no payments, either directly or indirectly, will inure to them.

The Administrative Services Agreement

[ABC] and [XYZ] have entered into an "Administrative Services Agreement" through which [XYZ] will provide [ABC] with "supervision of and assistance with" its business operations. The business operations encompassed within the administrative services agreement, include but are not limited to: (1) Sales assistance; (2) Promotional assistance; (3) Administrative and bookkeeping assistance; (4) The establishment and maintenance of [ABC"™s] books and records; (5) The preparation of financial statements; (6) The rendering of invoices to [ABC] customers; (7) The collection of receivables; (8) The payment of "any and all expenses associated with the business and affairs"¦including the marketing, sale and promotion of products sold by" [ABC]; (9) The "retention of professionals for all aspects of [ABC"™s] business and affairs in the United States;" and (10) "[A]ll other management services required for the efficient operation of [ABC"™s] business."

The administrative services agreement additionally authorizes [XYZ] to incur obligations and borrow money. [XYZ], without the prior approval of [ABC], may incur "any and all obligations or liabilities on the behalf of or for [ABC"™s] account" provided these obligations are "in the ordinary course if (sic) business." The agreement additionally authorizes [XYZ] to "borrow any and all amounts as [ABC] may require from time to time, whether from [XYZ], any institutional lender or factor or otherwise."

[ABC], in return for the services of [XYZ], agrees to pay a "Management Fee" "equal to five (5%) percent of [ABC"™s] gross sales volume anywhere throughout the world." [ABC] will, additionally, reimburse [XYZ] for the "reasonable expenses" [XYZ] incurs pursuant to the Administrative Services Agreement.

The Licensing Agreement

The licensing agreement proposed to be entered into between [ABC], as the licensee, and [XYZ], as the licensor, will grant to [ABC] the "non-exclusive" right to use the [XXXXX] trademark in connection with [ABC"TM"s] apparel products and the advertising and promotion of its apparel products. The license will only extend to [ABC"TM"s] operations in the United States and U.S. possessions, territories and military installations.

The agreement provides for the payment of royalties by [ABC] to [XYZ] on a quarterly basis. The royalties, in accordance with paragraph 11 of the Licensing Agreement, will be four percent of the "Net Sales" of the merchandise marketed under the trademark. The term "Net Sales" means "the aggregate of all sales made in the United States in a quarterly period less any and all discounts, returns, allowances, separately stated taxes, freight and insurance."

ISSUES

Are the "Design Fees" to be paid by [ABC] to [XYZ] "assists," as defined in 19 U.S.C. 1401a (h)(1)(A), the value of which must be added to the price actually paid or payable to determine the transaction value of [ABC"TM"s] imported merchandise ?

If the "Design Fees" to be paid by [ABC] to [XYZ] are assists, is the "per garment design charge" proposed by [ABC], as set forth in Paragraph 8 of the Design Agreement, a reasonable method of apportioning the value of the design assist ?

Are the interest and finance service fees payable by [ABC] to [XYZ] pursuant to the "Financing Agreement" additions to the price actually paid or payable in accordance with the transaction value method of appraisement ?

Are the "Management Fees" payable by [ABC] to [XYZ] pursuant to the "Administrative Services Agreement" additions to the price actually paid or payable in accordance with the transaction value method of appraisement ?

Are royalties paid by [ABC] to [XYZ] for the right to use the [XXXXX] trademark on garments manufactured by unrelated, foreign manufacturers and sold by [ABC] in the United States additions to the price actually paid or payable in accordance with the transaction value method of appraisement ?

LAW AND ANALYSIS

Overview

The federal agency responsible for interpreting and applying the United States Code and the regulations of the Bureau of Customs and Border Protection, as they relate to the final appraisement of merchandise, is Customs and Border Protection. Customs and Border Protection, in accordance with its legislative mandate, fixes the final appraisement of imported merchandise in accordance with Section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.□ See 19 U.S.C. 1401a.

The preferred method of appraisement is transaction value. The transaction value of imported merchandise is:

> the price actually paid or payable for merchandise when sold for exportation to the United States, plus amounts equal to "(A) the packing costs incurred by the buyer with respect to the imported merchandise; (B) any selling commissions incurred by the buyer with respect to the imported merchandise; the value, apportioned as appropriate, of any assist; any royalty or license fee related to the imported merchandise that

> the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and (E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller. 19 U.S.C. 1401a (b)(1).

The "price actually paid or payable," as defined in the Trade Agreements Act, is:

> the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller. 19 U.S.C. 1401a (b)(4)(A).

[ABC] and [XYZ], the parties involved in the proposed Customs transaction, are, according to information presented by counsel, "related" as defined in 19 U.S.C. 1401a (g). Customs and Border Protection, again based on the factual circumstances provided by counsel, does not deem it necessary to review 19 U.S.C. 1401a (b)(2)(B) addressing transaction value between related parties to respond to this ruling request. Although [ABC] is the buyer in the proposed transaction, the seller is not [XYZ] but are, rather, unrelated, foreign manufacturers.

The Design Agreement:

Assists

The transaction value method of appraisement provides that the "transaction value"¦is the price actually paid or payable"¦plus amounts equal to - "¦ (C) the value, apportioned as appropriate, of any assist." 19 U.S.C. 1401a (b)(1). The term "assist" is defined in 19 U.S.C. 1401a (h). Assist means:

> any of the following if supplied directly or indirectly, and free of charge or at a reduced cost, by the buyer of imported merchandise for use in connection with the production or sale for export to the United States of the merchandise:
>
> (i) Materials, components, parts, and similar items incorporated in the imported merchandise.
>
> (ii) Tools, dies, molds, and similar items used in the production of imported merchandise.
>
> (iii) Merchandise consumed in the production of imported merchandise.
>
> (iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise. Id.

The "imported merchandise" in the prospective transaction is clothing. The clothing will be designed by [XYZ] in Spain and subsequently manufactured by unrelated foreign manufacturers pursuant to contract(s) entered into between [ABC] and the manufacturers. [ABC], the buyer, will then import the garments into the United States.

The design work is indirectly supplied to the foreign manufacturers by [ABC]. It is supplied free of charge, as [ABC] is responsible for paying [XYZ] for the design work in accordance with their agreement. It will be used in

connection with the production of the merchandise exported to the United States and is necessary for the production of the clothing. It is the determination of this office that the fashion "design work" is an assist, the value of which must be appropriately apportioned to properly determine the transaction value of [ABC"TM"s] entries.

Apportionment of Assist

Customs and Border Protection, having determined that the design work is an assist, must now determine whether the method of apportioning the cost of the design work proposed by [ABC] is consistent with the valuation statute and Customs Regulations. CBP regulations, particularly, 19 C.F.R. 152.103 (e)(1), provide in part:

> The apportionment of the value of assists to imported merchandise will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. The method of apportionment actually accepted by Customs will depend upon the documentation submitted by the importer.

The importer in the instant ruling request submitted a copy of a "Design Agreement" that proposes to apportion the value of the design assist on a per garment basis. It is CBP"TM"s understanding from a review of the agreement, particularly paragraph 8, that the per garment value of the assist is determined by initially establishing the total value of the assist and then dividing the total value of the assist by the total number of garments manufactured using the design in issue. The total value of the assist is to include:

> any and all actual out of pocket costs and expenses incurred"¦directly on account of the design process"¦including but not limited to such costs and expenses incurred in the purchase of sample garments, payments to independent art studios for designs or design services, the aggregate consultation fees paid by [XYZ] to independent contractor designers, the aggregate salaries of [XYZ] dedicated design staff. See Design Agreement, para. 8.

The total number of garments is to include not only the garments manufactured for export to the United States using the relevant design, but is to encompass all garments manufactured by [XYZ], [ABC] or any other entity.□

Subsequent to determining the total value of the assist, [ABC] and [XYZ] will determine the total number of garments manufactured by [ABC], [XYZ] or any other entity. The value of the assist will then be divided by the number of garments produced to establish the "per garment" value of the assist.

It is the decision of this office that the "per garment design charge" apportionment proposed by [ABC] is a "reasonable method appropriate to the circumstances and in accordance with generally accepted accounting principles." [ABC] may apportion the value of the design assist as it proposes on a per garment basis.

It is the understanding of Customs and Border Protection from a review of the agreement and from counsel"TM"s submission that a link exists between the method of apportionment proposed and the merchandise imported. See HQ 545031 (June 30, 1993). Should it becomes evident in the actual implementation of the proposed method that a portion of the assist"TM"s value would not be subject to duty, the proposed method would then be found to be unreasonable and not in accordance with Customs regulations.

The Financing Agreement:

Interest and Finance Servicing Fees

Appraising merchandise pursuant to the transaction value method involves determining, among other matters, the "price actually paid or payable." 19 U.S.C. 1401a (b)(1). Paragraph (b)(4)(a) of section 1401a states that the "price actually paid or payable" means the total payment made or to be made by the buyer to or for the benefit of the seller for imported merchandise, whether the payment is made directly or indirectly, with certain enumerated exclusions.

Counsel suggests in this ruling request that the "price actually paid or payable" should not include the interest payments and finance service charges to be paid by [ABC], as the borrower, to [XYZ], as the lender, pursuant to the proposed financing agreement. Counsel directs the attention of CBP to Treasury Decision (T.D.) 85–111, as published in 50 Fed. Reg. 27886 (1985) and as clarified by Customs in 54 Fed. Reg. 29973 (1989), which sets forth guidelines concerning whether interest payments should be included in the price actually paid or payable. [ABC], through counsel, additionally notes that neither the interest charges nor the service fees will be paid directly or indirectly to the actual sellers, the unrelated, foreign manufactures.

It is the determination of this office that recourse to T.D. 85–111 is not warranted. Since [ABC] and [XYZ] do not have the relationship of buyer and seller, and neither the interest payments or service fees will inure directly or indirectly to the benefit of the unrelated, foreign seller-manufactures, a review of the guidance provided in T.D. 85–111 is not appropriate. The interest payments and finance service charges paid to a lender that is not also the seller should not be included in the price actually paid or payable to determine the transaction value of the relevant entries.

The Administrative Services Agreement:

Reasonable Expenses Reimbursement and Management Fee Payments

The Administrative Services Agreement presented to Customs and Border Protection, similar to the Financing Agreement, necessitates CBP to determine whether the reimbursement of "reasonable expenses" and the payment of the "Management Fee" set forth in the agreement are sums that must be included in the "price actually paid or payable" pursuant to section 1401a (b)(1) of the Trade Agreements Act. It is the determination of this office, subsequent to a review of the statutory law and prior Customs ruling letters, that the reimbursement of reasonable expenses and the payment of a management fee of five (5) percent of [ABC"TM"s] gross world-wide sales volume as stated in Administrative Services Agreement should not be added to the price actually paid or payable.

The Customs Service in HQ 542122 (Sept. 4, 1980) (TAA No. 4) addressed a similar situation. The issue presented to Customs in TAA No. 4 was whether [m]anagement services, accounting services, legal services and other services related to imported merchandise rendered abroad or in the United States by persons paid by their U.S. employers should be considered assists and added to the price actually paid or payable to determine the transaction value. It was the determination of Customs in TAA No. 4 that the services addressed did not constitute assists and should not be part of

the price actually paid or payable. The reasoning applied in TAA No. 4 is equally applicable to the instant Administrative Services Agreement proposed between [ABC] and [XYZ].

Headquarters Ruling Letter 543512 (April 9, 1998) also addressed a similar transaction and the analysis offered is also applicable. The buyer and seller in HQ 543512 were related parties and the transaction involved the foreign seller-manufacturer, in addition to manufacturing and selling the merchandise in issue, providing "accounting, finance, planning and clerical activities" for the buyer. Customs in HQ 543512 concluded that the fees paid by the buyer to the seller for the "accounting, finance, planning and clerical" services were not dutiable additions to the price actually paid or payable. It was Customs determination that the fees were not dutiable because they were "not tied to the sale for exportation of any specific merchandise." Id. Although the "price actually paid or payable" includes all payments to or for the benefit of the seller, whether direct or indirect, the instant management fees will not be "made, or to be made, for imported merchandise." 19 U.S.C. 1401a (b)(4)(A).

The Licensing Agreement:

Royalty Payments

Section 1401a (b)(1) of the value statute provides for five additions to the "price actually paid or payable" when utilizing the transaction value method of appraising imports for Customs purposes. Royalties and license fees are one of those additions. The price actually paid or payable should be increased to reflect any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States. 19 U.S.C. 1401a (b)(1)(D).

The Statement of Administrative Action (SAA), part of the legislative history of the TAA, reiterating the statute, sets forth that [a]dditions for royalties and license fees will be limited to those that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States. Statement of Administrative Action, H.R. Rep. No. 153, 96 Cong., 1st Sess., pt. 2, reprinted in, Department of the Treasury, Customs Valuation under the Trade Agreements Act of 1979 (Oct. 1981) at 48–49 (hereinafter SAA).

The SAA continues by noting that the dutiable status of royalty and license fees is determined on a "case-by-case" basis with royalty and license fees paid to third parties for use of copyrights and trademarks in the United States generally considered as a "selling expense of the buyer" and not dutiable. SAA, id. The final determination as to dutiability being ultimately dependent on:

> (i) whether the buyer was required to pay them as a condition of sale of the imported merchandise for exportation to the United States; and (ii) to whom and under what circumstances they were paid.

SAA, id.

The Customs Service, in an effort to further clarify the TAA and the SAA published a General Notice regarding the Dutiability of "Royalty" Payments. See 27 Cust. B. and Dec. 1 (Feb. 10, 1993) (herein after Dutiability of "Royalty" Payments). This issuance is commonly referred to as Hasbro II. Customs, in the General Notice, posed three questions to assist in determining whether royalty or license fees should be dutiable additions to the price ac-

tually paid or payable. The questions are: (1) Was the imported merchandise manufactured under a patent ?; (2) Was the royalty involved in the production or sale of the imported merchandise ?; and (3) Could the importer buy the product without paying the fee ? See generally HQ 546229 (May 31, 1996).

Royalty payments made because imported merchandise was manufactured under a patent or under circumstances in which the royalty was involved in the production or sale of the imported merchandise supports a conclusion that the payments are "related" to the imported merchandise. 19 U.S.C. 1401a (b)(1)(D). The importer"TMs ability to purchase the merchandise without having to pay a royalty or license fee "goes to the heart of whether a payment is considered to be a condition of sale." Dutiability of "Royalty" Payments, supra. Negative answers to questions (1) and (2), and an affirmative response to question (3) supports a determination that royalty payments are not dutiable.

Although CBP has set forth the law regarding whether royalties and license fees paid to third parties should be additions to the price actually paid or payable, this office is not in a position to provide a binding decision concerning the specific transaction proposed by [ABC]. Customs, in a General Notice dated August 8, 1995, advised the trade community that in order for Customs to better address the underlying issues relating to the dutiability of royalty or license fees, especially whether the buyer is required to pay the royalty or license fee as a condition of sale of imported merchandise for exportation to the United States"¦a review of the royalty agreement[s] relating to the payment of the royalty or license fees in question and any purchase / supply agreement[s] pertaining to the sale of the imported merchandise for exportation to the United States is necessary. 29 Cust. B. and Dec.10 (Sept. 6, 1995).

This office is, therefore, not able to thoroughly address this issue. Absent an opportunity to review the proposed purchase agreement, CBP is not able to conclusively determine that [ABC], as the buyer, is under no obligation to pay, directly or indirectly, any royalty or license fee to the foreign manufacturers as a condition of the sale.

HOLDING

The "Design Fees" to be paid by [ABC] to [XYZ] for designing the garments [ABC] will import into the United States are "assists" which must be appropriately apportioned and added to the price actually paid or payable to establish the transaction value of [ABC"TMs] entries.

The "per garment design charge" proposed by [ABC], as set forth in Paragraph 8 of the Design Agreement, is a reasonable method of apportioning the value of the design assist.

The interest charges and the finance service fees should not be included in the price actually paid or payable since the lender, [XYZ], is not also the seller of the merchandise proposed to be imported.

The reimbursement of "reasonable expenses" and the payment of the "Management Fee" set forth in the Administrative Services Agreement proposed between [ABC] and [XYZ] are not assists and should not be added to the price actually paid or payable to determine the transaction value of the entries of [ABC].

Customs and Border Protection is unable to determine whether royalty payments proposed to be made by [ABC] to [XYZ] for the right to use the [XXXXX] trademark in the United States in connection with its apparel

products and their advertising and promotion should be an addition to the price actually paid or payable when appraising merchandise for Customs purposes pursuant to the transaction value method of appraisement since Customs and Border Protection was not provided a copy of a proposed purchase or supply agreement.

The regulations of Customs and Border Protection, particularly 19 CFR Â § 177.9(b)(1), provides that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect." The application of a ruling letter by a CBP field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based.

VIRGINIA L. BROWN,
Chief,
Value Branch.

[ATTACHMENT B]

DEPARTMENT OF HOMELAND SECURITY.
BUREAU OF CUSTOMS AND BORDER PROTECTION,
HQ 548547
VAL:RR:CTF:VS 548547 GG
CATEGORY: Valuation

MR. JOHN A. BESSICH
FOLLICK & BESSICH
33 Walt Whitman Rd. Suite 204
Huntington Station, New York 11746

Re: Reconsideration of HQ 548316, dated July 16, 2003; valuation of payments for management services rendered to the buyer by a related company that is not the seller

DEAR MR. BESSICH:

This is in reference to Headquarters Ruling Letter (HQ) 548316, dated July 16, 2003, issued to you by this office regarding the valuation of certain imported women's garments. It has come to our attention that our analysis of an issue relating to payments made by the buyer for management services was incorrect. The purpose of this new letter is to modify HQ 548316 by applying the correct analysis. This should have no duty or appraisement consequences – past or future – for your client because under both analyses the payments are found to be not part of the price actually paid or payable. The modification is necessary, however, to prevent any future misunderstanding of our approach to this and similar issues. This letter is essentially a restatement of HQ 548316 except for those places where changes have been made with respect to the discussion of the management fees. As in HQ 548316, confidential treatment is being accorded this reconsideration.

FACTS

The relevant entities involved in the proposed transaction are ABC, a corporation organized under the laws of the State of New York, and XYZ, a corporation organized under the laws of Spain. Counsel for ABC advises the Bureau of Customs and Border Protection (CBP) that ABC and XYZ are "related parties" as defined in 19 U.S.C. 1401a (g).

It is ABC's intention to market and sell [*XXXXX*] trademarked women's garments at wholesale in the United States. The garments ABC intends to import will be designed by XYZ, the owner of the [*XXXXX*] trademark. Although XYZ owns the trademark, the garments will be manufactured outside of the United States by manufacturers that are unrelated, as defined in section 1401a (g), to either ABC or XYZ.

ABC, in the proposed transaction, will order and purchase the garments directly from the foreign manufacturers. The terms between ABC and the manufacturers will be "FOB, port of export." ABC, according to counsel, "will not be required to pay, either directly or indirectly, any royalties, license fees, the proceeds of resale, commissions, or any other costs or charges . . . as a condition of the sale of the merchandise." XYZ will design the garments that ABC will have manufactured and will, ultimately, import and sell in the United States.

Counsel for ABC advises Customs and Border Protection that ABC and XYZ will or have already entered into four agreements. The agreements include a design agreement, a financing agreement, an administrative services agreement and a licensing agreement.

The Design Agreement

ABC and XYZ propose entering into a "Design Agreement," a copy of which was provided to CBP. XYZ, pursuant to the design agreement, will provide ABC with design services for the garments that will bear the [*XXXXX*] trademark. ABC, CBP is advised, does not have a design staff.

XYZ will design, in Spain, the garments that ABC will have manufactured outside of the United States and will subsequently import and sell in the United States. ABC, according to the agreement, will pay XYZ directly for all design work. The foreign manufacturers of the garments ABC will sell in the United States will not incur any cost for design work and the sales prices of the merchandise from the manufacturers to ABC will not include any costs for garment design.

Paragraph 8 of the Design Agreement sets forth the "Design Fee" to be paid by ABC to XYZ. The design fee is a "per garment design charge" and is determined based on a "three calendar year average" of:

> (a) any and all actual out of pocket costs and expenses incurred by XYZ directly on account of the design process for each Seasonal Line including but not limited to such costs and expenses incurred in the purchase of sample garments, payments to independent art studios for designs or design services, the aggregate consultation fees paid by XYZ to independent contractor designers, the aggregate salaries of XYZ dedicated design staff;
>
> (b) divided by the total number of garments manufactured by XYZ, ABC and/or any other entity including distributors and licensees using the Designs created for each Seasonal Line during each such calendar year, which amount shall be calculated and adjusted annually throughout the Term.

Counsel for ABC advises that the importer will add the "per garment design charge" to the price actually paid or payable at the time of each entry.

The Financing Agreement

ABC and XYZ propose entering into a "Financing Agreement" through which XYZ will "fund the operations of [ABC's] business in the United States." The agreement, in paragraph 5, obligates ABC to pay "[i]nterest on the loans at the prime rate of interest established by Chase Bank, N.A. . . . as computed on the daily debt balances. . . ." The agreement further obligates ABC to pay a "service charge for each month's activities, which shall be $75 or 1 percent of the aggregate face amount of accounts receivable in which XYZ obtains a security interest . . . whichever is greater."

XYZ is to receive a "continuing security interest" in collateral specifically identified in paragraph 8 of the financing agreement. The foreign manufacturers are not parties to the financing agreement and no payments, either directly or indirectly, will inure to them.

The Administrative Services Agreement

ABC and XYZ have entered into an "Administrative Services Agreement" through which XYZ will provide ABC with "supervision of and assistance with" its business operations. The business operations encompassed within the administrative services agreement, include but are not limited to: (1) Sales assistance; (2) Promotional assistance; (3) Administrative and bookkeeping assistance; (4) The establishment and maintenance of [ABC's] books and records; (5) The preparation of financial statements; (6) The rendering of invoices to ABC customers; (7) The collection of receivables; (8) The payment of "any and all expenses associated with the business and affairs . . . including the marketing, sale and promotion of products sold by" ABC; (9) The "retention of professionals for all aspects of [ABC's] business and affairs in the United States;" and (10) "[A]ll other management services required for the efficient operation of [ABC's] business."

The administrative services agreement additionally authorizes XYZ to incur obligations and borrow money. XYZ, without the prior approval of ABC, may incur "any and all obligations or liabilities on the behalf of or for [ABC's] account" provided these obligations are "in the ordinary course if (sic) business." The agreement additionally authorizes XYZ to "borrow any and all amounts as ABC may require from time to time, whether from XYZ, any institutional lender or factor or otherwise."

ABC, in return for the services of XYZ, agrees to pay a "Management Fee" "equal to five (5%) percent of [ABC's] gross sales volume anywhere throughout the world." ABC will, additionally, reimburse XYZ for the "reasonable expenses" XYZ incurs pursuant to the Administrative Services Agreement.

The Licensing Agreement

The licensing agreement proposed to be entered into between ABC, as the licensee, and XYZ, as the licensor, will grant to ABC the "non-exclusive" right to use the [*XXXXX*] trademark in connection with [ABC's] apparel products and the advertising and promotion of its apparel products. The license will only extend to [ABC's] operations in the United States and U.S. possessions, territories and military installations.

The agreement provides for the payment of royalties by ABC to XYZ on a quarterly basis. The royalties, in accordance with paragraph 11 of the Licensing Agreement, will be four percent of the "Net Sales" of the merchandise marketed under the trademark. The term "Net Sales" means "the ag-

gregate of all sales made in the United States in a quarterly period less any and all discounts, returns, allowances, separately stated taxes, freight and insurance."

ISSUES

Are the "Design Fees" to be paid by ABC to XYZ "assists," as defined in 19 U.S.C. 1401a (h)(1)(A), the value of which must be added to the price actually paid or payable to determine the transaction value of [ABC's] imported merchandise ?

If the "Design Fees" to be paid by ABC to XYZ are assists, is the "per garment design charge" proposed by ABC, as set forth in Paragraph 8 of the Design Agreement, a reasonable method of apportioning the value of the design assist ?

Are the interest and finance service fees payable by ABC to XYZ pursuant to the "Financing Agreement" additions to the price actually paid or payable in accordance with the transaction value method of appraisement ?

Are the "Management Fees" payable by ABC to XYZ pursuant to the "Administrative Services Agreement" included in the transaction value as part of the price actually paid or payable?

Are royalties paid by ABC to XYZ for the right to use the [*XXXXX*] trademark on garments manufactured by unrelated, foreign manufacturers and sold by ABC in the United States additions to the price actually paid or payable in accordance with the transaction value method of appraisement ?

LAW AND ANALYSIS

Overview

The federal agency responsible for interpreting and applying the United States Code and the regulations of the Bureau of Customs and Border Protection, as they relate to the final appraisement of merchandise, is Customs and Border Protection. Customs and Border Protection, in accordance with its legislative mandate, fixes the final appraisement of imported merchandise in accordance with Section 402 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979.[1] *See* 19 U.S.C. 1401a.

The preferred method of appraisement is transaction value. The transaction value of imported merchandise is:

> the price actually paid or payable for merchandise when sold for exportation to the United States, plus amounts equal to –
>
> (A) the packing costs incurred by the buyer with respect to the imported merchandise;
>
> (B) any selling commissions incurred by the buyer with respect to the imported merchandise;
>
> (C) the value, apportioned as appropriate, of any assist;
>
> (D) any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States; and

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[1] *See generally, What Every Member of The Trade Community Should Know About: Customs Value*, an Informed Compliance Publication of Customs and Border Protection available on the World Wide Web site of Customs and Border Protection at www.cbp.gov.

(E) the proceeds of any subsequent resale, disposal, or use of the imported merchandise that accrue, directly or indirectly, to the seller. 19 U.S.C. 1401a (b)(1).

The "price actually paid or payable," as defined in the Trade Agreements Act, is:

the total payment (whether direct or indirect, and exclusive of any costs, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the merchandise from the country of exportation to the place of importation in the United States) made, or to be made, for imported merchandise by the buyer to, or for the benefit of, the seller. 19 U.S.C. 1401a (b)(4)(A).

ABC and XYZ, the parties involved in the proposed Customs transaction, are, according to information presented by counsel, "related" as defined in 19 U.S.C. 1401a (g). Customs and Border Protection, again based on the factual circumstances provided by counsel, does not deem it necessary to review 19 U.S.C. 1401a (b)(2)(B) addressing transaction value between related parties to respond to this ruling request. Although ABC is the buyer in the proposed transaction, the seller is not XYZ but are, rather, unrelated, foreign manufacturers.

The Design Agreement: Assists

The transaction value method of appraisement provides that the "transaction value . . . is the price actually paid or payable . . . plus amounts equal to - . . . (C) the value, apportioned as appropriate, of any assist." 19 U.S.C. 1401a (b)(1). The term "assist" is defined in 19 U.S.C. 1401a (h). Assist means:

any of the following if supplied directly or indirectly, and free of charge or at a reduced cost, by the buyer of imported merchandise for use in connection with the production or sale for export to the United States of the merchandise:

(i) Materials, components, parts, and similar items incorporated in the imported merchandise.

(ii) Tools, dies, molds, and similar items used in the production of imported merchandise.

(iii) Merchandise consumed in the production of imported merchandise.

(iv) Engineering, development, artwork, design work, and plans and sketches that are undertaken elsewhere than in the United States and are necessary for the production of the imported merchandise. *Id.*

The "imported merchandise" in the prospective transaction is clothing. The clothing will be designed by XYZ in Spain and subsequently manufactured by unrelated foreign manufacturers pursuant to contract(s) entered into between ABC and the manufacturers. ABC, the buyer, will then import the garments into the United States.

The design work is indirectly supplied to the foreign manufacturers by ABC. It is supplied free of charge, as ABC is responsible for paying XYZ for the design work in accordance with their agreement. It will be used in connection with the production of the merchandise exported to the United States and is necessary for the production of the clothing. It is the determi-

nation of this office that the fashion "design work" is an assist, the value of which must be appropriately apportioned to properly determine the transaction value of [ABC's] entries.

Apportionment of Assist

Customs and Border Protection, having determined that the design work is an assist, must now determine whether the method of apportioning the cost of the design work proposed by ABC is consistent with the valuation statute and Customs Regulations. CBP regulations, particularly, 19 C.F.R. 152.103 (e)(1), provide in part:

> The apportionment of the value of assists to imported merchandise will be made in a reasonable manner appropriate to the circumstances and in accordance with generally accepted accounting principles. The method of apportionment actually accepted by Customs will depend upon the documentation submitted by the importer.

The importer in the instant ruling request submitted a copy of a "Design Agreement" that proposes to apportion the value of the design assist on a per garment basis. It is CBP's understanding from a review of the agreement, particularly paragraph 8, that the per garment value of the assist is determined by initially establishing the total value of the assist and then dividing the total value of the assist by the total number of garments manufactured using the design in issue. The total value of the assist is to include:

> any and all actual out of pocket costs and expenses incurred . . . directly on account of the design process . . . including but not limited to such costs and expenses incurred in the purchase of sample garments, payments to independent art studios for designs or design services, the aggregate consultation fees paid by XYZ to independent contractor designers, the aggregate salaries of XYZ dedicated design staff. See Design Agreement, para. 8.

The total number of garments is to include not only the garments manufactured for export to the United States using the relevant design, but is to encompass all garments manufactured by XYZ, ABC or any other entity.[2]

Subsequent to determining the total value of the assist, ABC and XYZ will determine the total number of garments manufactured by ABC, XYZ or any other entity. The value of the assist will then be divided by the number of garments produced to establish the "per garment" value of the assist.

It is the decision of this office that the "per garment design charge" apportionment proposed by ABC is a "reasonable method appropriate to the circumstances and in accordance with generally accepted accounting principles." ABC may apportion the value of the design assist as it proposes on a per garment basis.

It is the understanding of Customs and Border Protection from a review of the agreement and from counsel's submission that a link exists between the method of apportionment proposed and the merchandise imported. *See* HQ 545031 (June 30, 1993). Should it become evident in the actual implementa-

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[2] Customs and Border Protection directs the attention of ABC to HQ 544238 (Oct. 24, 1988) and HQ 545500 (Mar. 24, 1995) in which Customs stated that "[i]f the anticipated production is only partially for exportation to the United States, then the method of apportionment will depend upon documentation submitted by the importer."

tion of the proposed method that a portion of the assist's value would not be subject to duty, the proposed method would then be found to be unreasonable and not in accordance with Customs regulations.

The Financing Agreement: Interest and Finance Servicing Fees

Appraising merchandise pursuant to the transaction value method involves determining, among other matters, the "price actually paid or payable." 19 U.S.C. 1401a (b)(1). Paragraph (b)(4)(a) of section 1401a states that the "price actually paid or payable" means the total payment made or to be made by the buyer to or for the benefit of the seller for imported merchandise, whether the payment is made directly or indirectly, with certain enumerated exclusions.

Counsel suggests in this ruling request that the "price actually paid or payable" should not include the interest payments and finance service charges to be paid by ABC, as the borrower, to XYZ, as the lender, pursuant to the proposed financing agreement. Counsel directs the attention of CBP to Treasury Decision (T.D.) 85–111, as published in 50 Fed. Reg. 27886 (1985) and as clarified by Customs in 54 Fed. Reg. 29973 (1989), which sets forth guidelines concerning whether interest payments should be included in the price actually paid or payable. ABC, through counsel, additionally notes that neither the interest charges nor the service fees will be paid directly or indirectly to the actual sellers, the unrelated, foreign manufactures.

It is the determination of this office that recourse to T.D. 85–111 is not warranted. Since ABC and XYZ do not have the relationship of buyer and seller, and neither the interest payments or service fees will inure directly or indirectly to the benefit of the unrelated, foreign seller-manufactures, a review of the guidance provided in T.D. 85–111 is not appropriate. The interest payments and finance service charges paid to a lender that is not also the seller should not be included in the price actually paid or payable to determine the transaction value of the relevant entries.

The Administrative Services Agreement: Management Fee Payments

The Administrative Services Agreement presented to Customs and Border Protection, similar to the Financing Agreement, necessitates CBP to determine whether the payment of the "Management Fee" by ABC to XYZ set forth in the agreement are sums that must be included in the transaction value as part of the "price actually paid or payable" pursuant to section 1401a (b)(1) of the Trade Agreements Act. It is the determination of this office that these payments are not so included.

Several court cases have addressed the meaning of the term "price actually paid or payable." In Generra Sportswear Co. v. United States, 905 F.2d 377 (Fed. Cir. 1990), the Court of Appeals for the Federal Circuit considered whether quota charges paid to the seller on behalf of the buyer were part of the price actually paid or payable for the imported goods. In reversing the decision of the lower court, the appellate court held that the term "total payment" is all inclusive and that "as long as the quota payment was made to the seller in exchange for merchandise sold for export to the United States, the payment properly may be included in transaction value, even if the payment represents something other than the per se value of the goods." The court also explained that it did not intend that CBP engage in extensive fact

finding to determine whether separate charges, all resulting in payments to the seller in connection with the purchase of imported merchandise, were for the merchandise or something else.

In Chrysler Corporation v. United States, 17 CIT 1049 (1993), the Court of International Trade applied the Generra standard and determined that although tooling expenses incurred for the production of the merchandise were part of the price actually paid or payable for the imported merchandise, certain shortfall and special application fees which the buyer paid to the seller were not a component of the price actually paid or payable. With regard to the latter fees, the court found that the evidence established that the fees were independent and unrelated costs assessed because the buyer failed to purchase other products from the seller and were not a component of the price of the imported engines. It has been CBP's position that, based on Generra, there is a presumption that all payments made by a buyer to a seller, or to a party related to the seller, are part of the price actually paid or payable. However, this presumption may be rebutted by evidence that clearly establishes that the payments, like those in Chrysler, are completely unrelated to the imported merchandise. See HQ 547175, dated April 21, 2000, and HQ 545663, dated July 14, 1995. In the case at hand, the Generra presumption does not apply because ABC makes the management payments to XYZ, which is neither a seller of the imported merchandise nor a company related to one of the sellers. Accordingly, the payments at issue are part of the price actually paid or payable only if the evidence establishes that they were for the imported merchandise and were for the benefit of the sellers. Based on the terms of the Agreement, the payments are not connected to the purchase of the imported merchandise but are for management services provided by XYZ to ABC in relation to its U.S. sales. There is no other evidence that the payments are made for the imported merchandise or that they benefit the sellers in any way. Accordingly, based on the facts submitted, including the Administrative Services Agreement, the payments are not included in transaction value as part of the price actually paid or payable for the imported merchandise.

We further note that the services provided by XYZ to ABC do not fall within the definition of the term "assist" as defined in 19 U.S.C. § 1401a (h). Therefore, the value of such services is not properly added to the price actually paid or payable as an assist.

The Licensing Agreement: Royalty Payments

Section 1401a (b)(1) of the value statute provides for five additions to the "price actually paid or payable" when utilizing the transaction value method of appraising imports for Customs purposes. Royalties and license fees are one of those additions. The price actually paid or payable should be increased to reflect

> any royalty or license fee related to the imported merchandise that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States. 19 U.S.C. 1401a (b)(1)(D).

The Statement of Administrative Action (SAA), part of the legislative history of the TAA, reiterating the statute, sets forth that

> [a]dditions for royalties and license fees will be limited to those that the buyer is required to pay, directly or indirectly, as a condition of the sale of the imported merchandise for exportation to the United States. *State-*

> *ment of Administrative Action*, H.R. Rep. No. 153, 96 Cong., 1st Sess., pt. 2, *reprinted in*, Department of the Treasury, Customs Valuation under the Trade Agreements Act of 1979 (Oct. 1981) at 48–49 (hereinafter *SAA*).

The SAA continues by noting that the dutiable status of royalty and license fees is determined on a "case-by-case" basis with royalty and license fees paid to third parties for use of copyrights and trademarks in the United States generally considered as a "selling expense of the buyer" and not dutiable. *SAA, id.* The final determination as to dutiability being ultimately dependent on:

> (i) whether the buyer was required to pay them as a condition of sale of the imported merchandise for exportation to the United States; and
>
> (ii) to whom and under what circumstances they were paid.
> *SAA, id.*

The Customs Service, in an effort to further clarify the TAA and the SAA published a *General Notice* regarding the *Dutiability of "Royalty" Payments. See* 27 Cust. B. and Dec. 1 (Feb. 10, 1993) (herein after *Dutiability of "Royalty" Payments*). This issuance is commonly referred to as *Hasbro II.* Customs, in the *General Notice*, posed three questions to assist in determining whether royalty or license fees should be dutiable additions to the price actually paid or payable. The questions are: (1) Was the imported merchandise manufactured under a patent?; (2) Was the royalty involved in the production or sale of the imported merchandise ?; and (3) Could the importer buy the product without paying the fee? *See generally* HQ 546229 (May 31, 1996).

Royalty payments made because imported merchandise was manufactured under a patent or under circumstances in which the royalty was involved in the production or sale of the imported merchandise supports a conclusion that the payments are "related" to the imported merchandise. 19 U.S.C. 1401a (b)(1)(D). The importer's ability to purchase the merchandise without having to pay a royalty or license fee "goes to the heart of whether a payment is considered to be a condition of sale." *Dutiability of "Royalty" Payments, supra.* Negative answers to questions (1) and (2), and an affirmative response to question (3) supports a determination that royalty payments are not dutiable.

Although CBP has set forth the law regarding whether royalties and license fees paid to third parties should be additions to the price actually paid or payable, this office is not in a position to provide a binding decision concerning the specific transaction proposed by ABC. Customs, in a *General Notice* dated August 8, 1995, advised the trade community that

> in order for Customs to better address the underlying issues relating to the dutiability of royalty or license fees, especially whether the buyer is required to pay the royalty or license fee as a condition of sale of imported merchandise for exportation to the United States . . . a review of the royalty agreement[s] relating to the payment of the royalty or license fees in question and any purchase / supply agreement[s] pertaining to the sale of the imported merchandise for exportation to the United States is necessary. 29 Cust. B. and Dec.10 (Sept. 6, 1995).

This office is, therefore, not able to thoroughly address this issue. Absent an opportunity to review the proposed purchase agreement, CBP is not able to

conclusively determine that ABC, as the buyer, is under no obligation to pay, directly or indirectly, any royalty or license fee to the foreign manufacturers as a condition of the sale.

HOLDING

The "Design Fees" to be paid by ABC to XYZ for designing the garments ABC will import into the United States are "assists" which must be appropriately apportioned and added to the price actually paid or payable to establish the transaction value of [ABC's] entries.

The "per garment design charge" proposed by ABC, as set forth in Paragraph 8 of the Design Agreement, is a reasonable method of apportioning the value of the design assist.

The interest charges and the finance service fees should not be included in the price actually paid or payable since the lender, XYZ, is not also the seller of the merchandise proposed to be imported.

The payment of the "Management Fee" by ABC to XYZ set forth in the Administrative Services Agreement is not included in transaction value as part of the price actually paid or payable. The payments also are not assists and thus are not additions to the price actually paid or payable. The holding in HQ 548316 is modified accordingly.

Customs and Border Protection is unable to determine whether royalty payments proposed to be made by ABC to XYZ for the right to use the [*XXXXX*] trademark in the United States in connection with its apparel products and their advertising and promotion should be an addition to the price actually paid or payable when appraising merchandise for Customs purposes pursuant to the transaction value method of appraisement since Customs and Border Protection was not provided a copy of a proposed purchase or supply agreement.

The regulations of Customs and Border Protection, particularly 19 CFR § 177.9(b)(1), provides that "[e]ach ruling letter is issued on the assumption that all of the information furnished in connection with the ruling request and incorporated in the ruling letter, either directly, by reference, or by implication, is accurate and complete in every material respect." The application of a ruling letter by a CBP field office to the transaction to which it is purported to relate is subject to the verification of the facts incorporated in the ruling letter, a comparison of the transaction described therein to the actual transaction, and the satisfaction of any conditions on which the ruling was based.

MYLES B. HARMON,
Director,
Commercial and Trade Facilitation Division.

United States Court of International Trade

One Federal Plaza
New York, NY 10278

Chief Judge

Jane A. Restani

Judges

Gregory W. Carman
Donald C. Pogue
Evan J. Wallach
Judith M. Barzilay
Delissa A. Ridgway
Richard K. Eaton
Timothy C. Stanceu

Senior Judges

Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Clerk

Leo M. Gordon

Slip Op. 05–162

LINCOLN GENERAL INSURANCE CO., Plaintiff, v. UNITED STATES, Defendant, and FRESH GARLIC PRODUCERS ASS'N, CHRISTOPHER RANCH, L.L.C., FARM GATE, L.L.C., THE GARLIC CO., VALLEY GARLIC, and VESSEY AND CO., Defendant-Intervenors.

Before: MUSGRAVE, JUDGE
Court No. 03–00546

[On a challenge by surety on import bonds to decision of U.S. Department of Commerce to rescind administrative review of a manufacturer, producer or exporter from the People's Republic of China, judgment for the defendant.]

Decided: December 22, 2005

Sandler, Travis & Rosenberg, P.A. (*T. Randolph Ferguson* and *Arthur Purcell*), for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice, (*Mark T. Pittman*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Peter J.S. Kaldes*), of counsel, for the defendant.

Collier Shannon Scott (*Michael J. Coursey* and *John M. Herrmann*), for the defendant-intervenors.

OPINION

This opinion addresses the merits of a challenge brought by plaintiff Lincoln General Insurance Company ("Lincoln") to the rescission of Hongda Dehydrated Vegetable Company ("Hongda"), a manufacturer, producer or exporter ("MPE") of the People's Republic of China ("PRC"), from an administrative review of *Antidumping Duty Order: Fresh Garlic From the People's Republic of China*, 59 Fed. Reg. 59209 (Nov. 16, 1994).[1] The essential question on this review of an

[1] "The clove with clout," as the *Miami News* dubbed it, makes eminently more sense of scents in the context of the order.

administrative record is whether the rescission, by the Department of Commerce, International Trade Administration ("Commerce"), was lawful despite Lincoln's urging that the administrative review be continued in light of the allegation that Hongda had been victimized by a massive import fraud scheme involving the identity theft (pirating) of Hongda's name and export number by certain unknown named entities.

Previously, the Court concluded that jurisdiction over this matter is proper pursuant to 19 U.S.C. §§ 1516a(a)(2)(A)(i)(I), (a)(2)(B)(iii), and 28 U.S.C. § 1581(c). *See Lincoln General Insurance Co. v. United States*, 28 CIT ___, Slip Op. 04–73, 341 F.Supp.2d 1265 (2004). At this stage, Lincoln moves for USCIT Rule 56.2 judgment arguing that Commerce's decision is unsupported by substantial evidence and is not in accordance with law, and it seeks vacatur of the rescission and remand for further proceedings. As was the case with Hongda, the Court is not unsympathetic to Lincoln's predicament; however, it is constrained to deny the motion and enter judgment for the defendant.

Background

Some familiarity with the underlying facts is presumed. *See id.* When the opportunity presented itself, the petitioners requested an administrative review of Hongda. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 67 Fed. Reg. 66612 (Nov. 1, 2002); *see also* 19 C.F.R. § 351.213(b). They were the only interested party to do so. Apparently, when it subsequently became clear that Hongda's new shipper review would likely[2] result in application against Hongda of the country-wide 376.67% antidumping duty rate (which has been imposed on entries of fresh garlic from all MPEs of the PRC since 1994), the petitioners immediately requested to withdraw their request for administrative review of Hongda on April 28, 2003. Public Record Document ("PR") 61. *See Fresh Garlic from the People's Republic of China: Partial Rescission of Antidumping Duty Administrative Review*, 68 Fed. Reg. 46580, 46581 (Aug. 6, 2003).

About eleven weeks later, Lincoln and Hongda argued to Commerce that they had uncovered a "massive" garlic import fraud scheme involving the identity theft of Hongda's name and export number, and that it was therefore in the public interest to continue the administrative review in order to shed light on the scheme and develop solutions for curtailing the fraudulent abuse of U.S. antidumping law with respect to PRC MPEs and resurrect public confi-

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[2] *See Fresh Garlic from the People's Republic of China: Preliminary Results of Antidumping Duty New Shipper Review*, 68 Fed. Reg. 22676 (April 29, 2003).

dence in the proper administration of PRC agricultural products. *See, e.g.*, PR 112, PR 114.

Considering the arguments for and against rescission of the administrative review, Commerce observed as follows:

> With respect to the petitioners' withdrawal of their review request for Hongda, Golden Light, Good Fate, Phil-Sino, and Mai Xuan, although the petitioners withdrew their review request for these five companies after the 90-day deadline, the Department's regulations at 19 CFR 351.213(d)(1) permit an extension of the deadline if "it is reasonable to do so." We have not committed significant resources to date to the review of Hongda, Golden Light, Good Fate, Phil-Sino, and Mai Xuan. Furthermore, the petitioners were the only party to request an administrative review of these companies.
>
> We have received no submissions opposing the withdrawal of the petitioners' requests as they pertain to Golden Light, Good Fate, Phil-Sino, and Mai Xuan. Although Hongda and several importers expressed concerns pertaining to the rescission of the administrative review of Hongda, the arguments they presented pertain to allegations involving fraud. The investigation of alleged fraudulent activities is within the statutory purview of the Bureau of Immigration and Customs Enforcement (ICE). *See* 19 USC 1592. Thus, we will refer Hongda's and the importers' allegations of inappropriate conduct to ICE.
>
> For the above reasons, we determine that it is reasonable to extend the deadline for withdrawal of the requests for review of Hongda, Golden Light, Good Fate, Phil-Sino, and Mai Xuan, and we are rescinding the review of the antidumping duty order on fresh garlic from the PRC with respect to these companies.

68 Fed. Reg. at 46581.

For Hongda, the rescission meant continuation of the new shipper review results. For Lincoln, the rescission implied surety liability of unimagined proportions. This action followed, in which the petitioners joined as defendants-intervenor but without briefing or otherwise participating.

Standard of Review

On an action such as this, the standard of review is to ascertain whether there is substantial evidence on the administrative record to support Commerce's "determination, finding or conclusion" or whether such is "otherwise not in accordance with law." *See* 19 U.S.C. § 1516a(b)(1)(B)(i); 28 U.S.C. § 2640(b). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*,

340 U.S. 474, 477, 71 S.Ct. 456, 459 (1951); *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938); *accord Matsushita Electric Industrial Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984). On that basis, the Court must avoid substituting judgment for that of Commerce, since the possibility of drawing a different conclusion from the same record evidence is insufficient to show that the conclusion drawn by the agency is unsupported by substantial record evidence. *See Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026–27 (1966).

An allegation of abuse of administrative discretion must be considered in the context of the administrative record, in accordance with the substantial evidence standard. *See, e.g., Fujian Machinery and Equipment Import & Export Corp. v. United States*, 25 CIT 1150,1155–56, 178 F.Supp.2d 1305, 1313–14 (2001) (discussing overlap between arbitrary and capricious standard and substantial evidence standard). More precisely, abuse of administrative discretion would be "not otherwise in accordance with law" under 19 U.S.C. § 1516a(b)(1)(B)(i). *Cf. Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005) ("[a]n abuse of discretion occurs where the decision is based on an erroneous interpretation of the law, on factual findings that are not supported by substantial evidence, or represents an unreasonable judgment in weighing relevant factors") (citation omitted; describing abuse in context of Administrative Procedure Act).

Discussion

As this matter and the related case of *Huaiyang Hongda Dehydrated Vegetable Co. v. United States*, 28 CIT ____ , Slip. Op. 04–148 (2004) indicate, interested parties may find their respective interests in completing an administrative review influenced by events or discoveries arising during the course of a proceeding. When U.S. trade law was amended from automatic to voluntary annual administrative review in 1984, Congress stated that the purpose was "to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority." H.R. Conf. Rep. No. 98–1156, 98th Cong., 2nd Sess. at 181 (1984), *reprinted in* 1984 U.S.C.C.A.N. 5220, 5297. *See also Ferro Union, Inc. v. United States*, 23 CIT 178, 181, 44 F.Supp.2d 1310, 1315 (1999) ("Commerce could rightly continue a review in which there is an expressed interest"). Permitting the subsequent withdrawal of a review request is premised on the recognition that an interested party may not know whether it had been in its interest to have requested an administrative review until the prior review had been completed, which might occur long after an order's anniversary. In order to avoid waste of resources and also prevent abuse of process through manipulation, Commerce's position has been that it is appropriate to retain discretion on whether to permit

a party to withdraw its request for administrative review beyond 90 days of a review's initiation.[3] Thus, the current regulation continues to state that once an administrative review is initiated, upon the request of the requesting party it "will" be rescinded within 90 days of its initiation or thereafter at Commerce's discretion. 19 C.F.R. § 351.213(d)(l). The reasonable exercise of the administering authority's discretion has been upheld in appropriate circumstances, *see, e.g.*, *Cosco Home and Office Products v. United States*, 28 CIT ___, ___, 350 F.Supp.2d 1294, 1296–97 (2004) (affirming rescission of review where the only party to timely request a review of two exporters also withdrew its request), *aff'd* Appeal No. 05–1230, 2005 WL 3161342 (Fed. Cir. Nov. 21, 2005) (unpublished mem.); *Yangcheng Baolong Biochemical Products Co., Ltd. v. United States*, 337 F.3d 1332 (Fed. Cir. 2003) (affirming rescission of review where exporter made no sales to U.S. during period of review), but its reasonable exercise is motivated by reasoned argument, not mere request. *See* 19 C.F.R. § 351.213(d)(1) ("[t]he Secretary may extend this time limit if the Secretary decides that it is *reasonable* to do so") (italics added). A party's opposition to rescission must likewise persuade and not merely request if it is to be effective.

I

Here, Lincoln's main contention is that Commerce denied it a "full and fair opportunity to be heard" by applying a double standard to its opposition to rescission versus the petitioners' eleventh-hour withdrawal request, especially since Commerce eviscerated the original deadline for preliminary review of the remaining respondents immediately after rescinding the administrative review with respect to Hongda. Lincoln argues that it brought the illegitimate Hongda imports to Commerce's attention as soon as they were discovered and that the timing of its appearance was irrelevant because Commerce still would have refused to accord standing to Lincoln, even if it had been possible to apprize Commerce of the import fraud

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[3] *See Antidumping Duties; Countervailing Duties; Final Rule*, 62 Fed. Reg. 27296, 27317 (May 19, 1997):

> [W]e believe that the Department must have the final say concerning rescissions of reviews requested after 90 days in order to prevent abuse of the procedures for requesting and withdrawing a review. For example, we are concerned with the situation in which a party requests a review, the Department devotes considerable time and resources to the review, and then the party withdraws its requests once it ascertains that the results of the review are not likely to be in its favor. To discourage this behavior, the Department must have the ability to deny withdrawals of requests for review, even in situations where no party objects.
>
> Therefore, in § 351.213(d)(1), we have retained the 90-day requirement. In addition we have added a new sentence, taken from 19 CFR §§ 353.22(a)(5) and 355.22(a)(3), that essentially provides that if a request for rescission is made after the expiration of the 90-day deadline, the decision to rescind a review will be at the Secretary's discretion.

earlier in the proceeding. Thus, Lincoln argues, Commerce's decision to rescind was a foregone conclusion and precluded a full development of the issues on the record. Since the administrative record is incomplete, according to Lincoln, the appropriate remedy is to vacate the rescission and allow Lincoln the opportunity to present its case before Commerce free from the "stigma of illegitimacy." P's Br. at 7–10.

As a preliminary matter, the government contends that any harm to Lincoln is contingent upon its principals' refusal to pay proper assessments of antidumping duties, and since refusal to pay is speculative at this point, the matter is not ripe for review. Lincoln responds that this matter concerns a challenge to the lawfulness of the decision to rescind administrative review under the circumstances presented, not to antidumping duty liability *per se*. *See* P's Reply at 8.

The Court agrees with Lincoln that on a challenge such as this, 28 U.S.C. § 1581(a), is not the appropriate mechanism to contest a decision to rescind an administrative review. When the Bureau of Customs and Border Protection ("Customs") merely follows Commerce's instructions in assessing and collecting antidumping duties, it does not, thereby, make an "antidumping decision" protestable pursuant to 19 U.S.C. § 1514, which is a necessary precursor for jurisdiction under 28 U.S.C. § 1581(a). *Mitsubishi Electronics America., Inc. v. United States*, 44 F.3d 973, 977 (Fed. Cir. 1994). "Customs must engage in some sort of decision-making process in order for there to be a protestable decision." *U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1569 (Fed. Cir. 1997). Similarly, the residual jurisdiction of subsection 1581(i) would at best permit a challenge to the lawfulness of Commerce's liquidation instructions to Customs but not to the underlying Commerce decision itself, *see*, *e.g.*, *Consolidated Bearings Co. v. United States*, 348 F.3d 997 (Fed. Cir. 2003), because it is clear that the complaint implicates a "final determination" that may be contested for purposes of subject matter jurisdiction, *e.g.*, *Yangcheng Baolong, supra*, 337 F.3d at 1333–34, and it is well-settled that subsection (i) jurisdiction may not be invoked when jurisdiction under another subsection of section 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate. *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir.1987), *cert. denied*, 484 U.S. 1041, 108 S.Ct. 773 (1988). Therefore, to the extent the government's argument further challenges jurisdiction on ripeness grounds, the Court reaffirms that jurisdiction over this action is appropriate under section 1581(c), which jurisdictional provision is not manifestly inadequate to Lincoln's claims. *See* Slip Op. 04–73.

In the related case of *Huaiyang Hongda, supra*, the Court concluded that Hongda's late expression of interest in the review's continuance had tipped the balance in Commerce's decision to rescind, and that it had not been an abuse of discretion for Commerce to con-

clude that the allegation of import fraud involving the identity theft of Hongda's name and export number was an insufficient reason to deny the petitioners' request to withdraw their original administrative review request, since identity theft would not have affected Hongda's participation in the review (or, for that matter, any Hongda data obtained therefor, at least in theory). At oral argument on Lincoln's motion, the Court understood Lincoln to argue only that it was not until issuance of Slip Op. 04–73 that the question of its standing before Commerce was settled, that in consequence of that opinion the administrative decision to rescind was necessarily rendered unlawful, and that it is therefore appropriate to restore the *status quo ante* by vacating the rescission and order reconsideration of Lincoln's claims. The argument thus advances the contention that the timing of Lincoln's entry into the proceeding was irrelevant because Commerce would have denied it standing regardless. As opposed to *Huaiyang Hongda*, however, the record does not reflect whether the timing of Lincoln's appearance influenced Commerce's decision, and the published decision does not comment upon it. Furthermore, Lincoln's arguments on standing notwithstanding, the record in fact shows that Commerce allowed Lincoln to present its claims in discussions over the telephone, in person, and as filed in Lincoln's subsequent submissions which are part of the administrative record and were not returned to Lincoln. *See* PR 94; PR 112; PR 114. Thus, the government argues that there was no "stigma of illegitimacy" about Lincoln before Commere, and that Commerce properly considered Lincoln's claims and properly observed that the investigation of an allegation of fraudulent import activity is within the statutory purview of Customs. Def's Br. at 12–13 (referencing *id.* & 68 Fed. Reg. at 46581). *See also* 19 U.S.C. § 1592(b) (delegating to Customs the task of initiating actions to recover unpaid duties and penalties arising from import fraud).

To be sure, as Lincoln argues, Commerce has the duty of conducting a full and fair inquiry into any matter with the potential to impact the calculation of antidumping duties and the duty of developing a full and fair record thereof in accordance with 19 U.S.C. § 1675. *See, e.g.*, *Hyundai Electronics Industries Co., Ltd. v. United States*, 28 CIT ___, 342 F.Supp.2d 1141, 1152 (2004); *NEC Corp v. U.S. Dep't of Commerce*, 21 CIT 933, 978 F.Supp. 314 (1997). *Cf. The Torrington Corp. v. United States*, 19 CIT 403, 410, 881 F.Supp. 622, 632 (1995) ("once an importer . . . has indicated on [an anti-reimbursement] certificate that it has not been reimbursed for antidumping duties, it is unnecessary for the Department to conduct an additional inquiry absent a sufficient allegation of customs fraud"); 19 C.F.R. § 351.402(f) (regarding submission of anti-reimbursement statements). Although those duties concern the agency's proper respect towards the substantive aspects of an antidumping proceeding,

the focus of whether to allow rescission of an initiated administrative review must likewise be a full and fair inquiry on the interest in the proceeding.

Before Commerce, Lincoln argued that it and Hongda would be aggrieved by rescission, that import fraud was a problem in the context of antidumping orders, and that Commerce had the duty to continue the review in order to "learn more about these alleged schemes and develop effective administrative techniques to counter such schemes." *See* 68 Fed. Reg. at 46581. These latter points concern Commerce's policy choices on the administration of antidumping law, and it would be inappropriate for a court to substitute judgment for that of Commerce on such matters. *See Suramerica de Aleaciones Laminadas. C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992) ("[o]ur duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute") (citing *Chevron U.S.A. Inc. v. National Resources Defense Council Inc.*, 467 U.S. 837, 866, 104 S.Ct. 2778, 2793 (1984)). Further, while import fraud involving identity theft is undoubtedly a serious concern, it is not clear the extent to which identity theft would impact dumping margins or whether administrative review is an appropriate forum for rooting out such fraud.[4] The purpose of an administrative or new shipper review of a particular MPE is to examine the MPE's pricing behavior during the period of review. A respondent's own pricing data, not those of identity thieves pursuing an import fraud scheme on the basis of the respondent's good name, are what forms the basis for determining the respondent's dumping margin. Fraudulent imports pursuant to an identity theft scheme would falsely inflate the volume of entries purportedly exported by the scheme's victim, in theory, but any pricing information on the fraudulent imports would normally be irrelevant to the determination on the margin, unless the scheme caused a respondent to alter its own pricing behavior in the U.S. market, which Lincoln does not suggest Hongda suffered.

In its briefs, Lincoln implied that it was aggrieved, through Commerce's decision, because the "schemes *resulted* in antidumping duty liability being imposed on innocent parties, including Hongda and Lincoln" and that "a continuation of the review allowing Hongda to answer the questionnaire (albeit late), *might have affected the dumping margin* by clearly indicating whether Hongda was entitled to a lower margin for legitimate export/import transactions and identify-

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[4] As an aside, the government represents that the reality of import fraud has sparked consideration of ways to strengthen certifications of factual information in these proceedings. *See, e.g., Certification of Factual Information to Import Administration Proceedings During Antidumping and Counterveiling Duty Proceedings*, 69 Fed. Reg. 56738 (Sep. 22, 2004) (notice of proposed rulemaking).

ing the counterfeit transactions which would be subject to the 376.67 percent rate." P's Reply at 2, 8 (italics added). Assuming proper consideration would have included confirmation of the extent of the alleged customs fraud, Lincoln therefore argues that Commerce therefore had the duty to continue the administrative review. *See id.* at 6.

This is putting the cart before the horse. It is not a reason to order continuation of the administrative review: the impact upon the antidumping margin of an allegation of import fraud pursuant to a scheme of identity theft would only matter in the event of a final determination upon the margin. At this point, there has been no such determination, so the fraud question is irrelevant to the question of the rate of antidumping duty. Yet, the accurate determination of the margin would necessarily depend upon Hongda's full participation at the administrative review, as that would be critical to accuracy in the determination as a whole. Hongda and Lincoln eventually represented to Commerce that Hongda wished to participate fully in the review, but by the time they opposed the petitioners' request to withdraw their administrative review request, Hongda had not responded to Commerce's questionnaire or submitted a timely request for administrative review on its own. Granted, Hongda may have been motivated by changed circumstances to take an interest in the administrative review, as was its right, and Commerce at the time might just as well have excused Hongda for the circumstances of its non-responsiveness to that point, but because it was not unreasonable for Commerce to decide to rescind administrative review of Hongda in light of Hongda's prior lack of interest in the proceeding to that point, it was not for the Court to substitute judgment thereon, as discussed in *Huaiyang Hongda*. *See, e.g., Consolo, supra*, 383 U.S. at 620.

Correlatively, whether Lincoln's appearance was timely or not, its request to continue the administrative review of Hongda necessarily depended upon Commerce's perspective of Hongda's interest in the review, and from that perspective Commerce deemed Lincoln's allegation of import fraud and Lincoln's policy arguments no more compelling to urge continuation of the administrative review than they had been coming from Hongda. The Court is unable to fault such reasoning. On the other hand, the rationale of justifying discontinuance in the face of an expression of interest in its continuance on the ground that Commerce has not committed many resources to an administrative review is very thin reasoning indeed, even if it is consistent with its position on 19 C.F.R. § 351.213(d)(1), *see supra*, note 3. To maintain trust in the fair execution of law by this nation's government, Commerce must, of course, avoid even the appearance of bias or impropriety, to say nothing of hypocrisy. *Cf., e.g., NKF Engineering, Inc. v. United States*, 805 F.2d 372 (Fed. Cir. 1986) (contracting officer may disqualify a bidder because of an appearance of improper conduct in order to preserve the integrity of the procurement sys-

tem). Implicating what it considers apparent impropriety, Lincoln directed attention to the fact that Commerce decided to rescind a mere five days after sending a memorandum to ICE regarding the allegation of fraud, and it argues that this circumstance supports the inference of a foregone conclusion.

The government's speedy execution of duty is not an oft-heard complaint. However, at oral argument the Court inquired further into a memorandum on the record, dated June 24, 2003, which reflects that a Commerce analyst explained to counsel for Lincoln over the telephone that with some exceptions Commerce usually grants parties' requests to withdraw requests for review even after the regulatory 90-day period. During the conversation, counsel for Lincoln argued that the deadline for the preliminary review could be extended to afford Hongda the opportunity to respond to Commerce's questionnaire. The analyst's response was to the effect that the deadline for the preliminary results was a little over a month away "so extending Hongda's deadline further for the original response was not especially feasible, given the need for a supplemental questionnaire." The officer then "acknowledged that an extension of the due date for our preliminary results is possible but [Commerce] had not yet made a decision in that regard." PR 94. One interpretation of this is that but for the imminent deadline for the preliminary determination, Commerce might have afforded Hongda the opportunity to respond to the questionnaire/supplemental questionnaire; thus, at oral argument the Court attempted to direct counsel's attention to whether Commerce was effectively sending an improper message concerning the administration of the nation's trade law. The government's response was to emphasize that enforcement of rules and regulations promotes fairness, as recently affirmed in *Cosco, supra. See PAM, S.p.A v. United States*, 29 CIT ___, ___, 395 F.Supp.2d 1337, 1344 (2005) ("compliance with procedures . . . 'creates certainty and predictability for all parties' as to the process of administrative reviews") (quoting *Cosco*, 28 CIT at ___, 350 F.Supp.2d at 1302).

After considering the parties' points, the Court is unable to state conclusively that the record evinces impropriety in Commerce's decision to immediately extend the preliminary deadline after rescinding the review with respect to Hongda, or more broadly that there was abuse of discretion on the administrative record with respect to the decision to rescind the administrative review of Hongda. Commerce considered the substance of the import fraud allegation and referred it to the agency statutorily tasked with its investigation. Commerce's consideration was not inappropriate.

II

In its reply brief, Lincoln raises the alternate argument that Commerce should have at least "delay[ed] rescission for a reasonable period while the fraud charges are investigated" because

> postponement of rescission [would have allowed] Commerce to formulate accurate and fair liquidation instructions for Customs to allow the latter to correctly assess antidumping duties. . . . [If] the administrative review of Hongda [is reopened], Commerce (in conjunction with [ICE]) will have time to investigate and distinguish counterfeit from legitimate shipments, and ensure that legitimate shipments are assigned a proper duty rate. At the very least, during the reopened proceedings Commerce should identify which shipment[s] actually came from Hongda and which did not.

P's Reply at 6–7.

The Court does not interpret Lincoln's argument as a plea for a writ of mandamus, which would be available only when performance by the agency has been refused and no meaningful alternative remedy exists. *See, e.g., Nakajima All Co., Ltd. v. United States*, 12 CIT 585, 588, 691 F.Supp. 358, 361 (1988). The government considers that liquidation continues to be enjoined during the pendency of this matter, and while the question of whether Commerce has an obligation to distinguish between the legitimate and the illegitimate Hongda imports on the liquidation instructions under the circumstances presented is doubtless important, the issue is unripe for review.

Nonetheless, the obverse point remains. Once Customs has been apprized of an allegation of import fraud, in this instance based on identity theft, there are reasons why it would have the duty to identify and segregate legitimate and illegitimate Hongda merchandise of its own accord, prior to liquidation and regardless of whether it has been so instructed by Commerce. One is for the purpose of gathering accurate import statistics, which must periodically be reported to Congress by Commerce. *See* 13 U.S.C. § 301 (authorizing collection of all information necessary to further United States commerce and requiring submission of periodic reports on import statistics to Congress); 19 U.S.C. §§ 1484(a)(2)(C) (requiring Customs to insure the accuracy and timeliness of import statistics); 1401(r) (defining "import activity summary statement" as the data or information transmitted electronically to Customs that enables it, *inter alia*, to "collect accurate statistics and determine whether any other applicable requirement of law . . . is met"); 1484(f) (statistical enumeration):

> The Secretary, the Secretary of Commerce, and the United States International Trade Commission shall establish from

> time to time for statistical purposes an enumeration of articles in such detail as in their judgment may be necessary, comprehending all merchandise imported into the United States and exported from the United States, and shall seek, in conjunction with statistical programs for domestic production and programs for achieving international harmonization of trade statistics, to establish the comparability thereof with such enumeration of articles. *All import entries and export declarations shall include or have attached thereto an accurate statement* specifying, in terms of such detailed enumeration, the kinds and quantities of all merchandise imported and exported and the value of the total quantity of each kind of article.

See also Sprague Electric Co. v. United States, 84 Cust. Ct. 243, 488 F.Supp. 910 (1980) (remanding to the U.S. International Trade Commission after discovery that official import statistics on which the Commission had relied had been incorrect). Another is for the proper monitoring and enforcement of quantitative restrictions in U.S. trade agreement obligations. *See, e.g., U.S. Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 544 F.Supp. 883 (1982), *aff'd*, 69 C.C.P.A. 172, 683 F.2d 399 (1982); *Mast Industries, Inc. v. Regan*, 8 CIT 214, 596 F.Supp. 1567 (1984).

At a minimum, Lincoln's allegation of import fraud from identity theft calls into question all representations on the declarations pertaining to the allegedly illegitimate Hongda garlic, which would include the proper identification of their country of origin. Their origin being in doubt, it is difficult to see how Customs could fulfill its mandate of border protection if it fails to distinguish between legitimate and illegitimate Hongda entries at liquidation. *Cf. United States v. Pentax Corp.*, 23 CIT 668, 69 F.Supp.2d 1361 (1999) (finding country of origin material, with "the potential to affect all of Customs' core decisions . . . [and] record-keeping"). Since Hongda obtained its own rate of duty, any commingling of legitimate and illegitimate Hongda entries in Commerce's liquidation instructions does not render it unnecessary for Customs to distinguish between legitimate and illegitimate Hongda entries at liquidation, whether or not the liquidation instructions so state. In other words, regardless of the exactitude of Commerce's liquidation instructions, it would appear that legitimate Hongda merchandise must be assessed the "Hongda" rate of antidumping duty and illegitimate Hongda merchandise the countrywide "all others" rate of antidumping duty, if any be appropriate, apart from whatever other duties, fines and/or penalties would be appropriate with respect to the allegedly illegitimate "Hongda" entries of garlic.

Conclusion

For the foregoing reasons, judgment must enter in favor of the defendant.

Slip Op. 05–163

SHAKEPROOF ASSEMBLY COMPONENTS DIVISION OF ILLINOIS TOOL WORKS, INC., Plaintiff, v. UNITED STATES, Defendant, and HANG ZHOU SPRING WASHER CO., LTD., Defendant-Intervenor.

Before: Richard W. Goldberg, Senior Judge
Court No. 05–0404

OPINION

[Commerce's partial consent motion for voluntary remand granted.]

Dated: December 22, 2005

McDermott, Will & Emery, LLP (*David John Levine*) for Plaintiff Shakeproof Assembly Components Division of Illinois Tool Works, Inc.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director; *Patricia M. McCarthy*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David Samuel Silverbrand*); *Ada Bosque*, Office of the Chief Counsel, U.S. Department of Commerce, for Defendant United States.

White & Case, LLP (*Adams Chi-Peng Lee* and *Emily Lawson*) for Defendant-Intervenor Hang Zhou Spring Washer Co., Ltd.

GOLDBERG, Senior Judge: This case is before the Court on a partial consent motion for voluntary remand of the final results of an administrative review of an antidumping duty order by the U.S. Department of Commerce (**"Commerce"**).

I. BACKGROUND

In *Certain Helical Spring Lock Washers from the People's Republic of China*, 70 Fed. Reg. 28274 (Dep't Commerce May 17, 2005) (final determination) (the ***"Final Results"***), Commerce determined that the weighted average dumping margin on sales of helical spring lock washers (the **"subject imports"**) to the United States by the Chinese respondent, Hang Zhou Spring Washer Co., Ltd. (**"Defendant-Intervenor"**), was 0.00 percent of the adjusted U.S. price for the subject imports as determined by Commerce. *Final Results* at 28274. This resulted in calculation of an antidumping duty rate of the same percentage. *Id.*

To reach this conclusion, it was necessary for Commerce to value the factors of production associated with the subject imports in order to calculate their normal value.[1] *Id.* at 28275; *see also* Defendant's

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[1] Normal value is a critical variable in antidumping calculations. It is intended to represent the price at which subject imports are first sold in their home market (or, where necessary, a comparable market). *See* 19 U.S.C. § 1677b(a)(1)(A)–(C) (1999). For antidumping investigations involving imports from non-market economies, like the People's Republic of China, Commerce may determine normal value by looking to the cumulated value of the factors of production associated with the subject imports. *Id.* § 1677b(c)(1). Once calculated,

Partial Consent Motion for a Voluntary Remand (**"Commerce's Mot."**) at 1. One such factor of production under consideration by Commerce was the value of so-called "plating services." *Id.* Commerce performed the same plating services valuation in both the preliminary results and the *Final Results*. *Id.*; *see also Certain Helical Spring Lock Washers from the People's Republic of China*, 69 Fed. Reg. 64903, 64905 (Dep't Commerce Nov. 9, 2004) (preliminary determination); Defendant-Intervenor's Opposition to Defendant's Motion for Voluntary Remand (**"Def.-Int.'s Opp."**) at 2. Although provided the opportunity to do so, the domestic petitioner, Shakeproof Assembly Components Division of Illinois Tool Works, Inc. (**"Plaintiff"**), did not object to Commerce's plating services valuation in its comments on the preliminary results or case brief to the agency. *Final Results* at 28275.[2]

Following publication of the *Final Results*, Plaintiff commenced this action by filing a summons with the Court on June 16, 2005. The next day, Plaintiff also timely filed with Commerce a request to correct certain "ministerial errors" purportedly made in the calculation of the dumping margin for Defendant-Intervenor. *See* Complaint dated July 15, 2005 (**"Compl."**) ¶ 6. Specifically, Plaintiff alleged that Commerce had valued the plating services factor of production erroneously, leading to a flawed normal value calculation and thus an incorrect dumping margin. *Id.* Plaintiff argued that, while Commerce had applied the correct plating price, it did so to the wrong weight value (i.e., Commerce applied the price to each kilogram of raw plating materials instead of each kilogram of lock washers). *Id.* ¶ 7. As proof of the mistake, Plaintiff noted that Commerce had "correctly applied" the plating price derived from the same source document in the previous administrative review of the same antidumping duty order. *Id.*

Commerce denied Plaintiff's request to correct the *Final Results* on July 8, 2005, concluding that Plaintiff's allegations "pertain[ed] to a methodological rather than ministerial issue" and were therefore not subject to correction using the ministerial error procedure.[3] *Id.* ¶ 10 (*quoting* Mem. to Edward C. Yang from Wendy J. Frankel, Re: Antidumping Duty Review of Certain Helical Spring Lock Wash-

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the normal value of subject imports is compared with their export price (or, where necessary, their constructed export price) to determine if the subject imports are being sold at less than fair value (or dumped) in the United States. *Id.* § 1677b(a).

[2] Rather, it was Defendant-Intervenor who raised several objections to Commerce's calculation of normal value, which Plaintiff affirmatively defended as "in accordance with law and substantially supported by evidence." *Final Results* at 28275.

[3] Exercised shortly after publication of a final determination, Commerce's ministerial error procedure is intended to give parties the opportunity to bring to the agency's attention any "errors in addition, subtraction, or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which [Commerce] considers ministerial." 19 U.S.C. § 1675(h) (1999).

ers from the People's Republic of China – Ministerial Error Allegations in Final Results, dated July 8, 2005). Three days later, on July 11, 2005, "senior Commerce officials discussed with counsel for [Plaintiff] . . . a course of action whereby, following the filing of a complaint, Commerce would move this Court for a 'voluntary remand' in order for Commerce to reconsider its decision." Compl. ¶ 11. Although described in Plaintiff's complaint, this *ex parte* communication was not documented on the administrative record. However, two other conversations which took place on that same day were made part of the record: a senior Commerce official was contacted separately by staff members from the offices of Senator Herb Kohl and Congresswoman Gwen Moore regarding Commerce's ministerial error determination. *See* Mem. to File from Susan Kuhbach, Acting Assistant Secretary, Import Administration, Re: Phone Conversation Regarding Ministerial Errors Memorandum, dated July 11, 2005. Specifically, the Congressional staffers sought a delay in Commerce's ministerial error determination to permit Plaintiff additional time to meet with the agency. *Id.* The Commerce official advised the Congressional staffers that this determination had in fact already been issued, and that the agency "did not view the issue as a ministerial error; and that if there was a possible methodological error, the only way for [Commerce] to consider it at this point would be if [Commerce] were sued." *Id.*

Plaintiff filed its complaint four days later, on July 15, 2005. The sole issue raised in the complaint concerned the allegedly erroneous valuation of the plating services factor of production and Commerce's failure to correct it through the ministerial error procedure. Compl. ¶ 12. On October 13, 2005, Commerce filed a motion requesting voluntary remand of the *Final Results*. Commerce's Mot. at 1. In its motion, Commerce did not admit error in the *Final Results*; rather, Commerce requested remand to enable the agency to "examine the methodologies available to value plating to discern which methodology leads to the most accurate results and explain its choice of methodology employed." *Id.* at 2. In its motion, Commerce also indicated that it would possibly seek additional information to augment its inquiry on this issue. *Id.* Plaintiff filed a brief supporting Commerce's request for voluntary remand on November 8, 2005. *See* Plaintiff's Response in Support of Defendant's Partial Consent Motion for Voluntary Remand (**"Pl.'s Resp."**) at 1. Defendant-Intervenor filed its brief in opposition on the same day. Def.-Int.'s Opp. at 1.

II. JURISDICTION AND JUSTICIABILITY

Pursuant to 28 U.S.C. § 1581(c), the Court has jurisdiction over cases involving appeals of the final results of administrative reviews performed by Commerce in the context of antidumping proceedings. Before exercising this jurisdiction in a given case, however, the Court is directed by statute to require the exhaustion of administra-

tive remedies "where appropriate[.]" 28 U.S.C. § 2637(d) (1999). Mindful of this prudential consideration, the Court believes that there is a question as to whether Plaintiff's failure to contest the valuation of plating services in response to Commerce's preliminary results should give rise to partial dismissal of this action for failure to exhaust. Nonetheless, after careful consideration, the Court concludes that dismissal is not warranted as to Plaintiff's claim of error in the *Final Results.*

Exhaustion is required principally because "[a] reviewing court usurps the agency's function when it sets aside a determination upon a ground not previously presented and deprives the agency of an opportunity to consider the matter, make its ruling, and state the reasons for its action." *Wieland Werke, AG v. United States*, 13 CIT 561, 567, 718 F. Supp. 50, 55 (1989). As a result of these concerns, the Court has generally declined to exercise jurisdiction over a claim involving methodological objections raised to Commerce only during the ministerial error procedure following a final determination. *See, e.g., Tianjin Mach. Imp. & Exp. Corp. v. United States*, 28 CIT ___, ___, 353 F. Supp. 2d 1294, 1306–07 (2004), *aff'd*, Appeal No. 05–1077 (Fed. Cir. Oct. 11, 2005); *Peer Bearing Co. v. United States*, 23 CIT 454, 457–60, 57 F. Supp. 2d 1200, 1204–06 (1999); *Aramide Maatschappij V.o.F. v. United States*, 19 CIT 1094, 1097–98, 901 F. Supp. 353, 357–58 (1995). Nevertheless, the Court has found it appropriate to exercise jurisdiction under such facts where Commerce itself has voiced support for the belated claim by requesting voluntary remand. *See, e.g., Magnesium Corp. of Am. v. United States*, 20 CIT 1092, 1104–05, 938 F. Supp. 885, 898 (1996), *aff'd*, 166 F.3d 1364 (Fed. Cir. 1999); *Ad Hoc Comm. of S. Cal. Producers of Gray Portland Cement v. United States*, 19 CIT 1398, 1403–04, 914 F. Supp. 535, 541–42 (1995); *Sugiyama Chain Co. v. United States*, 16 CIT 526, 533–35, 797 F. Supp. 989, 996–97 (1992).

Although the Court's rationale for this past exercise of jurisdiction has not been fully articulated, the Court has noted in other contexts that it "may exercise its discretion to prevent knowingly affirming a determination with errors." *Torrington Co. v. United States*, 21 CIT 1079, 1082 (1997). Likewise, where Commerce raises serious concerns about the accuracy of a determination through a request for voluntary remand, the Court may exercise its discretion with regard to the exhaustion of administrative remedies in order to subject to review a potentially erroneous administrative determination. *Cf. Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961) (in weighing reconsideration request, noting significance of "the public interest in reaching what, ultimately, appears to be the right result"). The desire to achieve accuracy in an administrative determination seriously questioned by Commerce before the Court,

combined to a lesser extent with the fact that recourse to the ministerial error procedure does provide Commerce with at least some opportunity to consider and rule on an objection at the administrative level, supports the Court's exercise of jurisdiction over a substantive claim raised only as ministerial error. *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (noting Court's "discretion to identify circumstances where exhaustion of administrative remedies does not apply").

In light of the foregoing, the Court concludes that it would be inappropriate to require strict exhaustion of administrative remedies to Plaintiff's claim of error in the *Final Results*. As discussed in detail *infra* at Part IV.A–B, the Court has determined that Commerce's request for voluntary remand is based on a substantial and legitimate concern about a certain aspect of the *Final Results*. Commerce's concern is sufficiently serious to call into question the accuracy of this determination. In order to correct the very real possibility of an inaccuracy in the *Final Results*, and in light of Plaintiff's recourse to at least the ministerial error procedure, the Court in its sound discretion chooses to exercise jurisdiction over Plaintiff's claim and consider Commerce's corresponding request for voluntary remand.

III. STANDARD OF REVIEW

Turning to its review of the merits of that request, the Court notes that, "[d]ue to the tripartite nature of a case like this, remand is not the automatic result of government acquiescence therein." *Brother Indus., Ltd. v. United States*, 15 CIT 332, 344, 771 F. Supp. 374, 386 (1991). Rather, in *SKF USA Inc. v. United States*, 254 F.3d 1022 (Fed. Cir. 2001), the U.S. Court of Appeals for the Federal Circuit (the **"Federal Circuit"**) discussed the appropriate standard of review to apply to an agency's motion for voluntary remand of an administrative determination.[4] There, the Federal Circuit distin-

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[4] Defendant-Intervenor contends that *SKF* is not applicable to this case, Def.-Int.'s Br. at 6, because, unlike *SKF*, Commerce's "remand request is not being made so it may confer a benefit on the parties paying duties." *Id.* at 5. In the Court's view, this factual distinction does not preclude reference to *SKF* for the appropriate standard of review. The *SKF* court described general legal principles concerning the obligations of a court charged with reviewing agency actions and evaluating agency litigation positions. There is no indication that the *SKF* court intended for these review standards to vary based on the specific factual distinction noted by Defendant-Intervenor, *see Corus Staal BV v. United States*, 27 CIT ____, ____, 259 F. Supp. 2d 1253, 1257 (2003) (questioning equal treatment of remands benefiting petitioners and respondents but nonetheless applying *SKF* standard of review framework), *aff'd*, 395 F.3d 1343 (Fed. Cir. 2005), nor does this Court believe that such variance is warranted.

guished among the various types of voluntary remand situations which could arise. *See SKF*, 254 F.3d at 1027–30. Where, as here,[5] the situation entails "no intervening events"[6] but the agency nonetheless requests "a remand (without confessing error) in order to reconsider its previous position[,]" the Federal Circuit indicated that a "reviewing court has discretion over whether to remand." *Id.* at 1029. The *SKF* court further noted that remand is generally appropriate "if the agency's concern is substantial and legitimate[,]" but may be refused "if the agency's request is frivolous or in bad faith." *Id.*

IV. DISCUSSION

Defendant-Intervenor objects to Commerce's request for voluntary remand on a number of grounds. Initially, Defendant-Intervenor argues that Commerce has not articulated a substantial and legitimate basis for remand in accordance with the *SKF* standard. Def.-Int.'s Br. at 6. Because Commerce "has not specifically apprised the Court of [sic] whether the reason for remand is an error or change in methodology[,]" Defendant-Intervenor contends that Commerce has provided insufficient justification for voluntary remand. *Id.* Defendant-Intervenor next argues that the need for finality in administrative proceedings militates against voluntary remand here. *Id.* at 7. Defendant-Intervenor notes that the statute and regulations governing antidumping proceedings already provided Plaintiff with ample opportunity to raise its objections to the plating services valuation. *Id.* at 7–8. Defendant-Intervenor argues that voluntary remand would unfairly allow Plaintiff "a second bite of the apple" purely because Plaintiff was able to marshal enough domestic political pressure to force Commerce to reconsider an otherwise final result. *Id.* at 8. Lastly, Defendant-Intervenor contests the scope of Commerce's remand request. *Id.* at 9. Defendant-Intervenor contends that Commerce's stated intention to potentially reopen the record in connection with the requested remand is unwarranted, as Commerce collected sufficient information on plating services from both parties during the course of the proceedings below. *Id.*

After careful consideration of Defendant-Intervenor's objections, particularly in light of the documented post-determination political maneuvering which took place in this case, the Court nonetheless

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[5] Plaintiff contends that "Commerce acknowledges that it erred[,]" Pl.'s Resp. at 1, which, if true, would require the Court to apply a somewhat different standard of review to the voluntary remand request under the *SKF* framework. However, the Court can find no support for Plaintiff's assertion in Commerce's remand request. Rather, in the Court's view, Commerce made clear its "wish[ ] to reconsider its position 'without confessing error.' " Commerce's Mot. at 2 (*quoting SKF*, 254 F.3d at 1029).

[6] Examples of intervening events include "a new legal decision or the passage of new legislation." *SKF*, 254 F.3d at 1028.

decides for the reasons set forth below to grant the voluntary remand requested by Commerce.

A. The Need for Commerce to Explain an Apparent Departure from Past Practice Is a Compelling Concern Weighing in Favor of Voluntary Remand

First, Commerce has provided a compelling justification for its remand request. In support of its motion, Commerce explained that the *Final Results* were based in part on a methodology which differed from one previously used in a substantially similar antidumping proceeding. Commerce's Mot. at 1–2. Commerce applied this methodology without justifying this seemingly disparate treatment, *id.*, apparently because an oversight prevented the agency from recognizing the availability of alternative methodologies. Pl.'s Br. at 1; Compl. ¶ 8.[7] It is an established principle of administrative law that an agency has a "duty to explain its departure from prior norms." *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973). Seeking consistency in antidumping proceedings, the Court has repeatedly applied this principle to determinations made by Commerce. *See, e.g.*, *Allied Tube & Conduit Corp. v. United States*, 29 CIT ___, ___, 374 F. Supp. 2d 1257, 1262 (2005) (noting that "Commerce must explain why it chose to change its methodology and demonstrate that such change is in accordance with law and supported by substantial evidence"); *Hussey Copper, Ltd. v. United States*, 17 CIT 993, 998, 834 F. Supp. 413, 419 (1993) (remanding because Commerce "failed to adequately articulate the reasons for its departure from its normal practice").

Viewed in this light, the justification for Commerce's motion for voluntary remand is persuasive. Commerce (with Plaintiff's support) has sufficiently demonstrated to the Court that it likely did depart from a former methodology in the *Final Results* without explanation.[8] If properly challenged on the merits, this type of agency action would likely provoke a court-ordered remand – i.e., the Court would require Commerce to "reconsider its previous position."[9] *SKF*, 254

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[7] The Court may consider the supporting justifications for voluntary remand provided by non-moving parties, in addition to those provided by the agency requesting remand. *Corus Staal*, 27 CIT at ____, 259 F. Supp. 2d at 1257.

[8] *Compare* Ninth Review Preliminary Results Calculation Memorandum for Hangzhou, dated Oct. 31, 2003, at 3 ("We multiplied this per kilogram surrogate value by the weight of the lock washer unit to value the plating process per unit."); *Certain Helical Spring Lock Washers from the People's Republic of China*, 69 Fed. Reg. 12119, 12121 (Dep't Commerce Mar. 15, 2004) (final determination) (adopting calculation memorandum methodology); *with Final Results* at 28275 (adopting different calculation of same surrogate value without explanation).

[9] The Court does not mean to imply that *any* agency action which might provoke the Court to remand a final determination is *per se* a compelling or persuasive justification for voluntary remand. This is necessarily a case-by-case analysis.

F.3d at 1029. It is immaterial that Commerce has not specifically indicated "whether the reason for [the requested] remand is an error or change in methodology." Def.-Int.'s Br. at 6. Rather, the need for an agency to adequately address a seeming departure from past practice – irrespective of the cause of such departure – is itself a significant concern weighing in favor of voluntary remand.[10] *Cf. Ugine-Savoie Imphy v. United States*, 24 CIT 1246, 1252, 121 F. Supp. 2d 684, 690 (2000) (in preliminary injunction context, noting that "public interest is served by ensuring that [Commerce] complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly") (quotation marks omitted).

B. Finality Concerns Do Not Outweigh the Otherwise Substantial and Legitimate Basis for Voluntary Remand in this Case

Second, the need for finality – although an important consideration – does not outweigh the justification for voluntary remand presented by Commerce in this case. "[C]oncerns for finality do exist[,]" *Corus Staal*, 27 CIT at ___, 259 F. Supp. 2d at 1257, and are properly weighed against an agency's proffered rationale for voluntary remand in order to determine if this rationale is in fact "substantial and legitimate[.]" *SKF*, 254 F.3d at 1029. As Defendant-Intervenor rightly notes, serious finality concerns in a given case could call into question the legitimacy of an agency's remand request and potentially give rise to an inference of bad faith. However, such serious concerns do not exist here.

As an initial matter, final determinations by Commerce in the antidumping arena are, for better or for worse, subject to routine appeal to this Court. This is true despite the various opportunities to reach consensus on the administrative level, despite the delay engendered by such appeal, and despite the relative difficulty of likely "having to deal with two different [agency] determinations (*i.e.*, the original final results and the remand results)." Def.-Int.'s Br. at 7. Notwithstanding Defendant-Intervenor's arguments to the contrary, this case is fairly typical of such an appeal: Plaintiff timely filed an action alleging non-frivolous objections to Commerce's determination which were previously raised in some form at the administrative level. Had Defendant-Intervenor been particularly unhappy with the *Final Results*, there can be no reasonable doubt that it too would have followed this course of conduct. *See Hangzhou Spring Washer Co., Ltd. v. United States*, 29 CIT ___, 387 F. Supp. 2d 1236 (2005)

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[10] Further, it is customary on initial remand to permit an agency the choice between better explaining its departure and modifying its determination to achieve conformity with past practice. The Court can conceive of no reason why this discretion should be limited *ex ante* simply because the agency, rather than a reviewing court, first identifies a potential problem in an administrative determination.

(remanding determination to agency for review of certain valuations to which importer objected). In short, the procedural posture of this case does not present any unusually serious finality concerns.

However, this case is somewhat exceptional with respect to the documented political machinations which preceded Commerce's request to reconsider an otherwise final determination. As the Court has previously observed in the voluntary remand context:

> [E]xperience has shown that the agency can be put in the unfortunate position of being requested by powerful domestic interests and Congress persons to alter positions to favor the domestic party. The agency should be protected from such post-determination maneuvering as much as is possible, in order to avoid charges of bad faith decision-making and needless litigation.

Corus Staal, 27 CIT at ___ n.4, 259 F. Supp. 2d at 1257 n.4. To protect the finality of agency decisions in cases involving post-determination political maneuvering, the Court exercises caution before accepting as legitimate proffered justifications for voluntary remand.

Here, the record evidence demonstrates a certain degree of political interest in the *Final Results*; however, upon careful examination, the Court concludes that this is *not* a case where such interest appears to have completely driven the agency's remand request. Commerce was given an opportunity to consider Plaintiff's objections in the administrative setting through the ministerial error procedure, where the agency concluded that it would be inappropriate to address Plaintiff's concerns. In the Court's view, this conclusion reflects a certain integrity in the agency's decision-making process. If Commerce had been truly captured by the domestic industry's lobby, as intimated by Defendant-Intervenor, it was within the agency's power to mischaracterize Plaintiff's objections as ministerial errors (at least a colorable argument under these facts) and seek leave from the Court to redress them at the administrative level. But Commerce did not do that. Instead, Commerce issued a decision contrary to Plaintiff. Commerce was then contacted by domestic political interests; but, even here, the subject of those conversations belies an immediate inference of political pressure to request remand. The memorandum summarizing these telephone calls indicates that Congressional staffers contacted Commerce in order to influence the timing of the agency's ministerial error determination, only to learn that this determination had already been issued. The memorandum does not mention discussion of a potential voluntary remand request by Commerce or any other possible agency litigation position in the event of appeal to this Court. As such, there is no direct evidence that Commerce was improperly pressured to reopen the *Final Results* through voluntary remand.

Of course, it is possible that other, off the record conversations took place between Commerce and political interests on the topic of voluntary remand. "The [C]ourt is sensitive to the problems parties face in gathering specific proof of unlawful political suasion. Such evidence, after all, is seldom highlighted on dog-earred [sic] pages of the administrative record." *Saha Thai Steel Pipe Co. v. United States*, 11 CIT 257, 260, 661 F. Supp. 1198, 1202 (1987). Nonetheless, there exists a "presumption of governmental good faith" in administrative proceedings. *United States v. Roses, Inc.*, 706 F.2d 1563, 1566 (Fed. Cir. 1983). The Court will not abandon this presumption absent a strong evidentiary showing, sometimes characterized as "well-nigh irrefragable proof" of bad faith. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1301–02 (Ct. Cl. 1976).[11] Here, while there is evidence that one *ex parte* conversation took place off the record,[12] this alone is not "tantamount to [the] showing of malice or conspiracy" against Defendant-Intervenor that would be necessary to rebut the presumption of governmental good faith. *Id.*, 543 F.2d at 1302.

At best, Defendant-Intervenor has demonstrated the mere *possibility* that Commerce may have been improperly motivated to seek voluntary remand of an otherwise final agency determination. Against this possibility, the Court must weigh the justification for voluntary remand advanced by Commerce. As previously noted, the Court finds this justification compelling and, despite the ambiguous finality concerns raised by Defendant-Intervenor, concludes that this is a sufficiently substantial and legitimate basis for remand. Accordingly, the Court exercises its discretion to grant the remand request.

C. The Scope of Commerce's Remand Request is Appropriate

Finally, the Court must consider whether the scope of Commerce's remand request is appropriate in light of the agency's stated intention to potentially reopen the administrative record in connection with its review. Defendant-Intervenor is correct that Commerce solicited and collected from both parties valuation information on plating services during the course of the proceedings below. Nevertheless, this prior data collection does not preclude Commerce from seeking additional information on remand. The alternative, previously overlooked methodology for valuing plating services may very

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[11] "This is a decision of a predecessor court binding on [the Federal Circuit]." *Roses, Inc.*, 706 F.2d at 1566.

[12] It is not entirely clear to the Court that the communication which took place between Commerce and Plaintiff after issuance of the *Final Results* and Commerce's ministerial error decision was strictly required to be memorialized and placed on the record. *See* 19 U.S.C. § 1677f(a)(3) (1999) (requiring Commerce to maintain records of *ex parte* communications which provide the agency with "factual information in connection with a proceeding"). The Court need not reach this question here. For purposes of the analysis of governmental good faith, it is enough to note that Commerce found it appropriate to place on the record other conversations which took place on the same day.

well require information that Commerce unwittingly failed to collect for purposes of the *Final Results*. Further, the Federal Circuit has disfavored limited remands which restrict Commerce's ability to collect and fully analyze data on a contested issue. *Am. Silicon Techs. v. United States*, 334 F.3d 1033, 1038–39 (Fed. Cir. 2003). "By sharply limiting Commerce's inquiry," the Court is concerned that, in this case, it may "actually prevent[ ] Commerce from undertaking a fully balanced examination[.]" *Id.* at 1039. Consequently, the Court concludes that the scope of Commerce's remand request, to include the ability to reopen the administrative record as to the single contested issue of plating services valuation, is appropriate.

V. CONCLUSION

For the foregoing reasons, Commerce's partial consent motion for voluntary remand is granted and a separate order will be issued accordingly. Although granting the agency's motion, the Court remains troubled by what may be fairly characterized as the appearance (if not existence) of improper political influence on an administrative determination. The Court will be watchful that Commerce's decision on remand is in fact supported by substantial evidence and in accordance with law.

SLIP OP. 05–164

MUKAND INTERNATIONAL, LTD., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.

Before: JANE A. RESTANI, Chief Judge
Court No. 05–00034

OPINION

[Defendant's Motion to Dismiss for Lack of Subject Matter Jurisdiction is Granted.]

Dated: December 22, 2005

Miller & Chevalier (*Peter J. Koenig*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, (*Stephen C. Tosini*), *Matthew D. Walden*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel, for the defendant.

Restani, Chief Judge: Mukand International, Ltd. ("Mukand") brings this action to request a writ of mandamus to compel the Bureau of Customs and Border Protection ("Customs") to refund all an-

tidumping duties collected on Mukand's entries of stainless steel bar ("SSB") produced in the United Arab Emirates ("UAE") using stainless steel wire rod ("SSWR") from India. Mukand asserts that the improperly liquidated entries were entered into the United States between June 5, 2000, and January 8, 2002. Defendant seeks to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(5).

BACKGROUND

On February 21, 1995, the Department of Commerce ("Commerce") issued an antidumping order upon SSB from India. *Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan*, 60 Fed. Reg. 9661 (Dep't Commerce Feb. 21, 1995) [hereinafter *SSB Order*]. In the *SSB Order*, Commerce imposed an antidumping duty rate of 21.02% on Mukand's entries of SSB from India using adverse facts available. *Id.* Beginning in June of 2000, Mukand began importing SSB produced in the UAE using SSWR from India. On March 22, 2005, Commerce clarified that entries of SSB produced in the UAE using SSWR from India are not subject to the *SSB Order*, but not before Customs liquidated Mukand's entries of SSB from UAE during the period of review from February 1, 2000 through January 31, 2001 ("POR 2000–2001") and the period of review from February 1, 2001 through January 31, 2002 ("POR 2001–2002").

On February 14, 2001, Commerce notified interested parties of the opportunity to request an administrative review of the *SSB Order* for the POR 2000–2001. *Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Admin. Review*, 66 Fed. Reg. 10,269 (Dep't Commerce Feb. 14, 2001). On March 22, 2001, Commerce initiated an antidumping duty administrative review, but no interested party requested a review related to Mukand's imports of SSB. *Initiation of Antidumping & Countervailing Duty Admin. Reviews & Requests for Revocations in Part*, 66 Fed. Reg. 16,037 (Dep't Commerce Mar. 22, 2001). Accordingly, on May 18, 2002, Commerce issued instructions to Customs to liquidate Mukand's entries of SSB for the POR 2000–2001.[1] *Def's Mot. to Dismiss* 3. On July 11, 2002, Commerce published the final results of its administrative review on SSB from India for the POR 2000–2001. *Stainless Steel Bar from India; Final Results of Antidumping Admin. Review*, 67 Fed. Reg. 45,956 (Dep't Commerce July 11, 2002) [hereinafter *2000–2001 Admin. Review Final Results*].

On February 1, 2002, Commerce notified interested parties of the opportunity to request an administrative review of the *SSB Order* for the POR 2001–2002. *Antidumping or Countervailing Duty Order,*

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[1] Mukand asserts that Customs liquidated the entries of Mukand SSB from UAE for the POR 2000–2001 on February 27, 2004. *Complaint* 7.

Finding, or Suspended Investigation; Opportunity to Request Admin. Review, 67 Fed. Reg. 4945 (Dep't Commerce Feb. 1, 2002). On March 7, 2002, Commerce initiated an antidumping duty administrative review at the request of interested parties, including Mukand. *Preliminary Results of Antidumping Duty Admin. Review & Partial Rescission of Admin. Review*, 67 Fed. Reg. 10,377 (Dep't Commerce Mar. 7, 2002). Commerce issued antidumping duty questionnaires to the interested parties on May 22, 2002, but Mukand submitted an untimely response, and Commerce refused to consider it.[2]

On September 10, 2002, Mukand submitted a scope ruling request to Commerce seeking clarification as to whether its entries of SSB produced in the UAE using SSWR from India were subject to the *SSB Order*. On October 28, 2002, Commerce acknowledged receipt of the scope ruling request, but determined that the request was incomplete and required Mukand to provide additional information.[3] Following subsequent Mukand submissions and Commerce rejections, Mukand filed its fourth and final scope ruling request on May 14, 2003, which Commerce accepted as a completed request.[4]

Simultaneously, Commerce conducted its administrative review for the POR 2001–2002. On March, 7, 2003, Commerce imposed a preliminary antidumping duty rate of 21.02% on Mukand's entries of SSB for the POR 2001–2002, using adverse facts available. *Notice of Preliminary Results of Antidumping Duty Admin. Review: Stainless Steel Bar from India*, 68 Fed. Reg. 11,058 (Dep't Commerce March 7, 2003). Mukand submitted a brief and rebuttal challenging Commerce's determination on the ground that data from Customs only pertained to SSB from the UAE produced by Mukand's affiliate, United Bright Steels, Ltd., not SSB produced by Mukand in India. On August 11, 2003, Commerce published the final results of its administrative review on SSB from India for the POR 2001–2002. *Stainless Steel Bar from India; Final Results of Antidumping*

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[2] On May 22, 2002, Commerce issued an antidumping duty questionnaire to Mukand with a response deadline of June 28, 2002. Without requesting an extension, Mukand responded on August 2, 2002, stating that it made no SSB shipments to the United States during the POR. Commerce determined that it would not consider Mukand's late response. It noted, however, that shipment data furnished by Customs indicated that Mukand made SSB shipments to the United States during the POR.

[3] In its response to Mukand, Commerce stated that it was uncertain as to whether Mukand was requesting a scope ruling with respect to the SSB Order or with respect to the antidumping order upon SSWR from India. *See Antidumping Duty Order: Certain Stainless Steel Wire Rods from India*, 58 Fed. Reg. 63,335 (Dep't Commerce Dec. 1, 1993) [hereinafter *SSWR Order*]. Mukand submitted additional scope ruling requests on November 25, 2002, and April 30, 2003. By letters dated January 10, 2003, and May 14, 2003, Commerce rejected each request on the ground that the requests were incomplete.

[4] Following Mukand's May 14, 2003 submission, Commerce did not respond with a request for additional information. In its motion to dismiss, the government concedes that Commerce accepted this request as a completed request for a scope ruling. *See Def's Mot. to Dismiss* 2.

Admin. Review, 68 Fed. Reg. 47,543 (Dep't Commerce Aug. 11, 2003) [hereinafter *2001–2002 Admin. Review Final Results*]. Commerce affirmed its use of the adverse facts available rate for Mukand based on its untimely response and did not address Mukand's scope argument. *Id.* On October 17, 2003, Commerce directed Customs to lift suspension and liquidate these entries. On November 14, 2003, Customs liquidated Mukand's entries of SSB. Mukand filed protests against Customs' liquidation of the entries, and Customs denied the protests.

On January 19, 2005, Mukand filed a complaint against Commerce seeking a writ of mandamus to compel Commerce to issue a scope determination, suspend any further liquidation, and refund all antidumping duties on Mukand's imports of SSB from UAE. Mukand also supplemented its outstanding application for a scope ruling by letter dated February 22, 2005. On March 25, 2005, Commerce formally initiated a scope inquiry and issued a preliminary scope ruling determining that Mukand's entries of SSB from UAE were outside the scope of the antidumping order. *Initiation of Scope Inquiry & Preliminary Scope Ruling Memorandum* (Dep't Commerce Mar. 25, 2005). On May 23, 2005, Commerce issued a final scope ruling determining that SSB produced in the UAE using SSWR from India is not subject to the *SSB Order. Final Scope Ruling, Antidumping Duty Orders on Stainless Steel Bar from India & Stainless Steel Wire Rod from India*, (Dep't Commerce May 23, 2005) [hereinafter *Final Scope Ruling*].

DISCUSSION

At present, Mukand seeks a refund of antidumping duties paid on imports of SSB from UAE that Commerce determined to be outside the scope of the *SSB Order.*[5] Mukand's complaint asserts that Commerce failed to follow its scope determination procedures, which caused the improper liquidation of Mukand's entries. Mukand argues that Commerce accepted its request for a scope ruling on May 13, 2003, after which it was required, "[w]ithin 45 days of the date of receipt of an application for a scope ruling," to issue a final ruling or initiate a scope inquiry. 19 C.F.R. § 351.225(c)(2). If Commerce had initiated an inquiry, Mukand argues that it would have been required to instruct Customs to continue the then ongoing suspension of liquidation for its entries pending a scope ruling. *See* 19 C.F.R § 351.225(l)(1) (When Commerce "conducts a scope inquiry . . . and the product in question is already subject to suspension of liquidation, that suspension of liquidation will be continued, pending a pre-

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[5] The parties agree that Mukand's request for a writ of mandamus to compel Commerce to issue a scope determination and to suspend liquidation of Mukand's entries of SSB from UAE was mooted by the *Final Scope Ruling.*

liminary or a final scope ruling."). Commerce did not, however, formally initiate a scope inquiry until March 25, 2005.[6] Mukand argues that Commerce erred by failing to initiate the scope inquiry within 45 days, and erred by failing to continue suspension of liquidation of Mukand's entries.

As an initial matter, the Court considers whether it has subject matter jurisdiction to review this case. Mukand asserts that jurisdiction to seek reliquidation is appropriate under 28 U.S.C. § 1581(i) (2000). The government contends that § 1581(i) jurisdiction is inappropriate because Mukand could have brought this action under 28 U.S.C. § 1581(a). Moreover, the government argues that this court lacks jurisdiction because the liquidation of Mukand's entries is final under 19 U.S.C. § 1514(a) (2000).

I. Mukand could not have initiated this action under 28 U.S.C. § 1581(a).

Under § 1581(a), the Court of International Trade has "exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930 [19 U.S.C. § 1515]." 28 U.S.C. § 1581(a). A civil action under § 1515 may commence after a party protests a Customs liquidation decision, and receives an allowance or denial of the protest pursuant to 19 U.S.C. § 1514. At the time of Customs' liquidation decision, the following decisions were subject to protest:

> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 1337 of this title;
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof,
> (6) the refusal to pay a claim for drawback; or
> (7) the refusal to reliquidate an entry under subsection (d) of section 1520 of this title;

19 U.S.C. § 1514(a). A protestable Customs decision is subject to § 1581(a) jurisdiction and is otherwise "final and conclusive upon all

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[6] The parties appear to agree that Commerce failed to timely respond to Mukand's request. The government concedes that in its May 14, 2003 submission, "Mukand requested that Commerce find that the stainless steel bar that Mukand produces in the United Arab Emirates . . . out of stainless steel wire rod from India is not within the scope of the order upon stainless steel bar from India," yet it does not explain why Commerce did not initiate a scope inquiry until March 25, 2005. *Def's Mot. to Dismiss* 2, 12.

persons." *Id.* Here, the government contends that Mukand could have protested this action under 19 U.S.C. § 1514(a)(5), so subject matter jurisdiction is unavailable under 28 U.S.C. § 1581(i).

Subsection 1581(i) is a residual jurisdiction provision, which provides in relevant part,

> the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —
> . . . (4) administration and enforcement with respect to the matters referred to in . . . subsections (a)–(h) of this section.

28 U.S.C. § 1581(i)(4). Litigants may not invoke jurisdiction under § 1581(i) "when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate." *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987).

In the instant case, Mukand's challenge to Commerce's compliance with its regulatory procedures for reviewing scope determinations is not an action available to Mukand under § 1581(a). "Section 1514(a) does not embrace decisions by other agencies [besides Cutsoms]."[7] *Mitsubishi*, 44 F.3d at 976. Commerce is charged with handling antidumping determinations, including scope determinations, and challenges to those determinations are brought under 28 U.S.C. § 1581(c).[8] Commerce is also charged with administering the final results of antidumping determinations, including following its detailed procedures for scope ruling requests under 19 C.F.R. § 351.225. Challenges relating to its administration of the final results of antidumping duty determinations may be brought under 28 U.S.C. § 1581(i). *See Consol. Bearings Co. v. United States*, 348 F.3d 997, 1002 (Fed. Cir. 2003) ("[A]n action challenging Commerce's liq-

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[7] In adopting the Trade Agreements Act of 1979 ("1979 Act"), Congress intended "to distinguish between claims that were subject to protest under 19 U.S.C. § 1514 and judicial review under 28 U.S.C. § 1581(a) on the one hand and claims that were subject to § 751 administrative reviews and/or judicial review under 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c) on the other." *Mitsubishi Elecs. Am., Inc. v. United States*, 18 CIT 167, 173, 848 F. Supp. 193, 198 (1994); *see also* H.R. Rep. No. 96–1235, at 44 (1980) (stating that § 1581(a) should not be used to circumvent the exclusive method of judicial review of an antidumping determination listed in section 516A of the Tariff Act of 1930 (19 U.S.C. § 1516a)). Specifically, the 1979 Act amended 19 U.S.C. § 1514(a) and (b) to exclude antidumping determinations from the list of matters that parties may protest to Customs. *Mitsubishi Elecs. Am. Inc. v. United States*, 44 F.3d 973, 976 (Fed. Cir. 1994).

[8] It is also clear that jurisdiction was not available under 28 U.S.C. § 1581(c). Section 1581(c) provides the Court of International Trade with "exclusive jurisdiction of any civil action commenced under Section 516A of the Tariff Act [codified as 19 U.S.C. § 1516a]." Section 516A provides that an interested party may commence an action to challenge an administrative determination described in 19 U.S.C. § 1516a(a)(2)(B), which does not provide an avenue to challenge Commerce's failure to comply with the scope ruling requirements of 19 C.F.R. § 351.225.

uidation instructions is not a challenge to the final results, but a challenge to the 'administration and enforcement' of those final results.").

Once Commerce instructs Customs to liquidate entries, "Customs merely follows Commerce's instructions in assessing and collecting duties." *Mitsubishi*, 44 F.3d at 977. Customs cannot "modify Commerce's determinations, their underlying facts, or their enforcement." *Id.* (quoting *Royal Bus. Machs, Inc. v. United States*, 1 CIT 80, 87, 507 F. Supp. 1007, 1014 n.18 (Ct. Int'l Trade 1980)). Customs plays a "merely ministerial role in liquidating antidumping duties." *Mitsubishi*, 44 F.3d at 977.

Here, the government does not allege, and the record does not reflect, that Commerce's instructions provided Customs with any discretion to exceed its ministerial role. Moreover, the government does not allege that Customs erred in its interpretation of the scope of the *SSB Order*. *Cf. Xerox Corp. v. United States*, 289 F.3d 792, 795 (Fed. Cir. 2002) ("[W]here the scope of the antidumping duty order is unambiguous and undisputed, and the goods clearly do not fall within the scope of the order, misapplication of the order by Customs is properly the subject of a protest under 19 U.S.C. § 1514(a)(2)."). Therefore, Customs' implementing decision was not a protestable decision within the meaning of § 1514, and Mukand could not have initiated a 28 U.S.C. § 1581(a) action.

Accordingly, the court does not lack subject matter jurisdiction to consider Mukand's request for a writ of mandamus under 28 U.S.C. § 1581(i) based on the availability of an action pursuant to 28 U.S.C. § 1581(a).

II. The court is precluded from reviewing this case by Mukand's failure to protect its entries from liquidation.

The Federal Circuit has held that a preliminary injunction is appropriate to prevent liquidation of entries because "[o]nce liquidation occurs, a subsequent decision by the trial court on the merits . . . can have no effect." *Zenith Radio Corp. v. United States*, 710 F.2d 806, 810 (Fed. Cir. 1983). Here, Mukand brings a 28 U.S.C. § 1581(i) action to obtain a refund of antidumping duties it paid on imports of SSB from UAE that Commerce determined post-liquidation to be outside the scope of the *SSB Order*. The Court concludes that Mukand's failure to seek injunctive relief prior to the liquidation of its entries of SSB from UAE precludes the Court from exercising subject matter jurisdiction to consider its refund request. *See Mitsubishi*, 18 CIT at 180, 848 F. Supp. at 203 (holding that "failure to seek injunctive relief against liquidation before commencing [an] action . . . precludes [the] Court from exercising jurisdiction under 28 U.S.C. § 1581(I)"), *aff'd on alternative grounds*, 44 F.3d 973, 977; *see also SKF USA Inc. v. United States*, 316 F. Supp. 2d 1322, 1327 (Ct. Int'l Trade 2004) ("After an antidumping review determination,

if a party's entries are liquidated prior to judicial review of the determination and antidumping duties are assessed, any outstanding challenges as to those entries are rendered moot because liquidation, absent errors by Commerce or Customs, places the entries outside the jurisdiction of the court.").

In the instant case, Mukand did not seek an administrative review for the POR 2000–2001, and while Mukand requested an administrative review for the POR 2001–2002, it failed to submit a timely administrative review questionnaire response as required for participation.[9] The administrative review for the POR 2001–2002 proceeded without Mukand's participation, and instead Mukand followed the procedure for submitting a scope ruling request to Commerce pursuant to 19 C.F.R. § 351.225. Commerce accepted Mukand's scope ruling request on May 14, 2003, but did not initiate a scope inquiry until March 25, 2005. Mukand argues that Commerce was required to either initiate a scope inquiry or issue a scope determination within 45 days of its scope ruling request. 19 C.F.R. § 351.225(c)(2). Moreover, Mukand asserts that if Commerce had initiated a scope inquiry, it was required to suspend liquidation of entries pending a scope ruling. 19 C.F.R § 351.225(l)(1).

On August 11, 2003, Commerce published the *2001–2002 Admin. Review Final Results*, rejecting Mukand's argument that Commerce was required to consider Mukand's untimely questionnaire submission before assigning an antidumping duty rate. Commerce assigned a total adverse facts available rate of 21.02% to Mukand's entries, and provided Mukand with notice that it would instruct Customs to liquidate entries and assess duties at the assigned rate. *2001–2002 Admin. Review Final Results*, 68 Fed. Reg. at 47,545. Although Mukand received notice that Customs would liquidate its entries at the total adverse facts available rate, Mukand did not take any steps to prevent the liquidation, which occurred on November 14, 2003. Instead, Mukand waited for Customs to liquidate its entries, then filed a protest with Customs, which was denied.

The Court finds that Mukand should not have waited until Customs denied its protest to file a § 1581(i) action. Mukand should have filed a § 1581(i) action with this Court as soon as it received notice of the potential liquidation of its entries and obtained injunctive relief against liquidation before Customs liquidated its entries. *See Mitsubishi*, 18 CIT at 180, 848 F. Supp. at 203 (injunctive relief pursuant to 28 U.S.C. § 1581(i) is appropriate where Commerce failed to begin an administrative review as required by 19 C.F.R. § 353.53a(d)(1)); *Interredec, Inc. v. United States.*, 11 CIT 45, 46 n.1, 652 F. Supp. 1550, 1553 n.1 (1987) (injunctive relief pursuant to 28

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[9] When Mukand submitted an answer, it was two months late and it did not specifically assert that Mukand's entries of SSB were outside the scope of the *SSB Order.*

U.S.C. § 1581(i) is appropriate to contest Commerce's refusal to conduct a § 751 review).

Mukand argues that it has a right to reliquidation under the Federal Circuit's decision in *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297 (Fed. Cir. 2004). In *Shinyei*, the plaintiff alleged that Commerce erroneously instructed Customs to liquidate entries contrary to Commerce's amended final results. Prior to liquidation, the plaintiff brought an action seeking a writ of mandamus to obtain immediate liquidation in accordance with the amended final results. While the action was pending, Customs liquidated the plaintiff's entries, and the plaintiff amended its action to seek reliquidation of its entries.

The court held that the Court of International Trade is not divested of § 1581(i) subject matter jurisdiction merely by the liquidation of the plaintiff's entries. *Shinyei*, 355 F.3d at 1310. The court distinguished the case from *Mitsubishi* on its facts, as a case where the plaintiff did not sleep on its rights:

> In the present case, Shinyei cannot be described as a party that has slept on its rights. Rather, Shinyei filed suit in the Court of International Trade seeking a writ of mandamus ordering liquidation of its entries at the rate it thought it was entitled to—the lower rate set forth in the Amended Review Results. When its entries were liquidated "as entered" pursuant to Commerce's clean up instruction, Shinyei amended its complaint and alleged that Commerce had failed to comply with section 1675(a)(2)(B).

Id. at 1309–10. The court also noted that the plaintiff had already obtained an injunction against liquidation of entries during litigation of a challenge to the final results of an administrative review.[10]

Thus, while the court declined to extend the Federal Circuit's holding in *Zenith* to actions brought post-liquidation under § 1581(i), *Shinyei*, 355 F.3d at 1309, it recognized the strong presumption against reliquidation of entries where the plaintiff does not pursue all available avenues to prevent the unnecessary liquidation of entries by Customs. The court finds *Shinyei's* distinction relevant here, and declines to extend the court's holding to the facts of this case, where the Court finds that the plaintiff slept on its rights, then protested Customs' liquidation of its entries, before bringing a § 1581(i) action.

The court relies, in part, on the Federal Circuit's recognition in *Sandvik* of the twin purposes of administrative exhaustion, i.e., protecting administrative agency authority and promoting judicial effi-

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[10] It is not clear from the decision in *Shinyei* how broad the injunction was and whether or not the injunction permanently enjoined any liquidation not in accordance with the final court decision.

ciency. *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998). In *Sandvik*, the court held that under the doctrine of administrative exhaustion the plaintiff was not entitled to judicial relief for the liquidation of entries purported to be outside the scope of an antidumping order because the plaintiff failed to seek a scope ruling request pursuant to 19 C.F.R. § 351.225. Here, Mukand filed an application for a scope ruling request, but failed to seek an injunction pending a Commerce scope ruling, even after it become clear that its entries would be liquidated before Commerce responded.[11]

As in *Sandvik*, the purpose of protecting administrative agency authority is particularly applicable to this case because the "[s]ound administration of the antidumping laws counsels that Commerce, which administers those laws, should in the first instance decide whether an antidumping order covers particular products." *Sandvik*, 164 F.3d at 600. Here, instead of diligently pursuing a Commerce scope determination, Mukand raised its scope issue with Customs in its liquidation protest. Moreover, the purpose of judicial efficiency is especially appropriate here because Commerce subsequently decided that Mukand's imports of SSB from UAE were not covered by the *SSB Order*, so pursuing pre-liquidation remedies would have saved the resources expended by Customs in implementing the antidumping duty order, reviewing the protest, and by this Court in the present litigation. *See id.* (stating that had the importers filed for scope determinations, Commerce may have decided the imports were not covered by the order, thus preventing litigation).

Accordingly, the Court concludes that Mukand's failure to seek injunctive relief before Customs liquidated its entries precludes the Court from exercising § 1581(i) subject matter jurisdiction over its request for reliquidation.

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[11] While the Court rests its decision on Mukand's failure to diligently pursue its injunctive remedies, the Court also recognizes that Mukand did not pursue all of the administrative remedies available to it. Here, Mukand did not seek an administrative review for the POR 2000–2001, and it was assigned an adverse facts available rate for the POR 2001–2002 because it filed an untimely questionnaire response.

Mukand addressed this point, arguing that seeking a scope determination through the administrative review process would have been futile because Commerce provided 19 C.F.R. § 351.225 as an exclusive administrative procedure for requesting scope rulings. While the Court agrees that the regulation provides a detailed process for filing scope ruling requests, the Court also recognizes that it has long approved the use of the administrative review process as an avenue for challenging the scope of antidumping duty orders. *See Kyowa Gas Chem. Indus. Co. v. United States*, 7 CIT. 138, 140, 582 F. Supp. 887, 889 (1984) ("It is undisputed that in a § 1675(a) review proceeding the ITA may clarify the scope of a prior dumping finding.").

Here, Commerce did not object to Mukand's pursuit of the scope ruling request route after it failed to pursue the administrative review process. Apparently, both avenues are available, but only the administrative review route will secure an automatic suspension of liquidation.

CONCLUSION

In light of the foregoing, the court finds that Mukand's request for reliquidation of entries is barred by its failure to pursue injunctive relief prior to liquidation of its entries. Accordingly, defendant's motion for summary judgment is granted.

Slip Op. 05–165

FORMER EMPLOYEES OF THERMAL & INTERIOR, VANDELIA OPERATIONS OF DELPHI CORP. (UNITED STEELWORKERS OF AMERICA), Plaintiff, v. UNITED STATES SECRETARY OF LABOR, Defendant.

Before: Richard W. Goldberg, Senior Judge
Court No. 05–00040

MEMORANDUM OPINION AND JUDGMENT ORDER

GOLDBERG, Senior Judge: This case, involving a denial of certification for trade adjustment assistance by the U.S. Department of Labor, is before the Court following an order to show cause why this action should not be dismissed for lack of prosecution. The Court has jurisdiction pursuant to 28 U.S.C. § 1581(d).

This action was filed by plaintiff on January 18, 2005. Issue was joined by the filing of defendant's answer on March 25, 2005. Subsequently, the Court entered a scheduling order to govern disposition of the case. That scheduling order established a due date of October 3, 2005 for any motions by plaintiff addressed to the pleadings, the administrative record or other matters related to the case. Following plaintiff's failure to submit any such motions by that date, and upon proper motion by defendant, the Court issued an order to show cause why this case should not be dismissed for failure to prosecute. Plaintiff's response to this order to show cause was due on December 12, 2005. To date, no response has been filed.

Accordingly, upon consideration of the foregoing, and upon due deliberation, it is hereby

ORDERED that, pursuant to USCIT Rule 41(b)(3), this action is dismissed for lack of prosecution.

SO ORDERED.

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